Supreme Court, U.S.
FILED
JUL 1 2005
OFFICE OF THE CLERK

No. 05-43

In The

# Supreme Court of the United States

VINCENT A. CIANCI, JR.,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## PETITION FOR WRIT OF CERTIORARI

JOHN A. MACFADYEN
*Counsel of Record*
MACFADYEN, GESCHEIDT & O'BRIEN
The Owen Building
101 Dyer Street
Providence, RI 02903
(401) 751-5090

*Attorney for Petitioner*
*Vincent A. Cianci, Jr.*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Table of Contents | ii |
| Table of Authorities | iii |
| Citation to Opinion Below | 1 |
| Jurisdiction | 1 |
| Statutory Provisions Involved | 1 |
| Statement of the Case | 2 |
| A. The Indictment | 4 |
| B. The Trial | 7 |
| C. The Appeal | 9 |
| Reasons for Granting the Petition | 11 |
| I. RICO | 11 |
| A. Varying Approaches | 14 |
| B. Decision Below Incorrect | 17 |
| II. RULE 803(3) | 20 |
| A. The Conflict | 20 |
| B. Decision Below Incorrect | 27 |
| Conclusion | 30 |

## TABLE OF AUTHORITIES

Page

CASES

*Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001) ..... 12

*Chang v. Chin*, 80 F.3d 1293 (9th Cir. 1996) ..... 18

*Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397 (9th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) ..... 17

*Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892) ..... 21, 22, 23, 28

*Reves v. Ernst & Young*, 507 U.S. 170 (1993) ..... 7

*Russello v. United States*, 464 U.S. 16 (1983) ..... 28

*Ryan v. Clemente*, 901 F.2d 177 (1st Cir. 1990) ..... 4, 14

*Shepard v. United States*, 290 U.S. 96 (1933) ..... 22, 23

*Stephens, Inc. v. Geldermann*, 962 F.2d 808 (8th Cir. 1992) ..... 16, 18

*United States v. Arthur*, 949 F.2d 211 (6th Cir. 1991) ..... 25

*United States v. Cianci*, 210 F.Supp.2d 71 (D.R.I. 2002) ..... 3, 7

*United States v. Cianci*, 378 F.3d 71 (1st Cir. 2004) ....*passim*

*United States v. DeBright*, 730 F.2d 1255 (9th Cir. 1984) ..... 21

*United States v. DiMaria*, 727 F.2d 265 (2nd Cir. 1984) ..... 21, 24

*United States v. Feldman*, 853 F.2d 648 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989) ..... 9, 15, 17, 18

TABLE OF AUTHORITIES – Continued

Page

*United States v. Jackson*, 780 F.2d 1305 (7th Cir. 1986) ..... 26

*United States v. Lawal*, 736 F.2d 5 (2nd Cir. 1984) ..... 24

*United States v. LeMaster*, 54 F.3d 1224 (6th Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996) ..... 21, 24, 25

*United States v. Miller*, 874 F.2d 1255 (9th Cir. 1989) ..... 29

*United States v. Peak*, 856 F.2d 825 (7th Cir. 988) ... 21, 24, 29

*United States v. Perlholtz*, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988) ..... 16

*United States v. Ponticelli*, 622 F.2d 985 (9th Cir.), *cert. denied*, 449 U.S. 1016 (1980) ..... 21, 24, 25, 26

*United States v. Reyes*, 239 F.3d 722 (5th Cir.), *cert. denied*, 533 U.S. 961 (2001) ..... 21, 24, 25, 26

*United States v. Thompson*, 685 F.2d 993 (6th Cir 1982), *cert. denied sub nom., Sisk v. United States*, 1459 U.S. 1072 (1982) ..... 18

*United States v. Turkette*, 452 U.S. 576 (1981) ... 11, 12, 13, 19

*Vandenbroeck v. Common Point Mortgage Company, et al.*, 210 F.3d 696 (6th Cir. 2000) ..... 16, 18

STATUTES AND RULES

United States Code

18 U.S.C. § 1961 ..... 2, 3, 5, 14

18 U.S.C. § 1962 ..... 12

Federal Rules of Evidence

F.R.Evid. 403 ..... 29

F.R.Evid. 801 ..... 22

F.R.Evid. 803 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

American Law Institute, *Model Code of Evidence* (1942) ..... 27

McLaughlin, *Weinstein's Federal Evidence* (2nd ed. 2002) ..... 29

Saltzburg, *et al.*, *Federal Rules of Evidence Manual* (8th ed. 2002) ..... 21, 29

Strong, *et al.*, *McCormick on Evidence* (1999) ..... 21

Valori, *Special Topics in the Law of Evidence: The Meaning of "Bad Faith" Under the Exceptions to the Hearsay Rule*, 48 U. Miami L.Rev. 481 (1993) ..... 21

## PETITION FOR WRIT OF CERTIORARI

Vincent A. Cianci, Jr. prays that a writ of *certiorari* issue to review the decision of the United States Court of Appeals for the First Circuit entered on August 10, 2004.

## CITATION TO OPINION BELOW

The Opinion of the United States Court of Appeals for the First Circuit is reported at 378 F.3d 71 and is reproduced in Appendix A. The Order of the First Circuit denying petitioner's request for rehearing and for rehearing *en banc* is reproduced in Appendix B. The judgment of the First Circuit is reproduced in Appendix C.

## JURISDICTION

The decision of the United States Court of Appeals for the First Circuit was entered on August 10, 2004. A timely petition for rehearing and for rehearing *en banc* was denied on October 8, 2004. The judgment was entered on April 5, 2005. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

F.R.Evid. 803(3):

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

18 U.S.C. § 1961:

As used in this chapter –

* * *

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

## STATEMENT OF THE CASE

This cases poses two significant issues for review:

- First, whether the definition of RICO enterprise under 18 U.S.C. § 1961 encompasses an association-in-fact allegedly formed for the unlawful purpose of enriching its individual members through criminal activity, where the association includes municipal entities which do not share that illicit purpose, but are instead the passive instruments through which the defendants effectuate sporadic acts of racketeering.

- Second, whether F.R.Evid. 803(3) authorizes the trial court to exclude relevant statements of then-existing future intention on the ground that the court has "doubt" concerning the declarant's sincerity, or finds his sincerity "unclear," or whether, to the contrary, the Rule leaves the question of the hearsay declarant's credibility to the jury.

The RICO issue is presented here in high relief because the entities alleged to have participated in the illegal-purpose enterprise included a municipal corporation – the City of Providence, Rhode Island – and certain of its departments, which by charter and operation of law can function only for lawful purposes. It is sharpened by the explicit findings of the trial court that "there is no evidence that the [City] departments and/or agencies, themselves, shared [the enterprise's] purposes," *United States v. Cianci*, 210 F.Supp.2d 71, 73 (D.R.I. 2002) (*Cianci I*), and that "none of [defendants' racketeering] acts, . . . resulted in any significant disruption of a Governmental function." *Id.*

Nevertheless, a majority of the Court of Appeals for the First Circuit found that a shared illegal intent could be "imputed to the City," thereby establishing an association-in-fact under 18 U.S.C. § 1961, even in the absence of any ascertainable structure of ongoing illegality, where the individual members of the enterprise were City officials who had legal and functional authority over the entities which they episodically exploited to commit illegal acts. *United States v. Cianci, et al.*, 378 F.3d 71, 84 (1st Cir. 2004) (*Cianci II*). Dissenting, Circuit Judge Howard observed that, in permitting "a person or entity to be named part of an unlawful purpose enterprise on mere evidence that the person or entity acceded to a mobster's

request (but without knowledge of the purposes underlining the request), we would be heading down the slippery slope against which then-Judge Breyer warned in *Ryan* [*v. Clemente*, 901 F.2d 177 (1st Cir. 1990)]: that of failing to differentiate between associations that fall within the sweep of RICO and associations involving only the exploitation of others by criminals." *Id.* at 111.

The First Circuit also upheld the trial court's exclusion under F.R.Evid. 803(3) of an exculpatory statement of intention by the defendant, which was caught on tape by a wired FBI *poseur* in the middle of the alleged conspiracy, on the ground that the Court had "doubts" about the defendant's sincerity in making the statement, thereby removing the question of defendant's credibility from the jury. This ruling adds a new interpretation – to date the most extreme – to an already conflict-laden array of Circuit decisions concerning the role of judge and jury in admitting or excluding state-of-mind hearsay under F.R.Evid. 803(3). This question is important not because of its complexity, but because of its everyday occurrence in federal litigation. It is bread and butter, not pannini and *foie gras*. The only relevant precedent from this Court predates the enactment of the Federal Rules of Evidence by almost a century.

## A. The Indictment

Vincent A. Cianci, Jr. is the former mayor of the City of Providence, Rhode Island. Together with four other individuals, including his Chief of Staff, Frank E. Corrente, he was charged with conducting and conspiring to conduct the affairs of a hydra-headed enterprise allegedly consisting of the defendants themselves, thirteen specific

agencies of the City, the City itself, a City vendor, and a campaign finance organization.[1] The *Redacted Indictment* postulated a *de facto* illicit-purpose enterprise which was said to have begun in 1991 and to have conducted its affairs through 1999.[2] In addition to the RICO and RICO

---

[1] Paragraph 38 of the *Redacted Indictment* defined the RICO enterprise in the following terms:

> 38. Defendants VINCENT A. CIANCI, JR., a/k/a Buddy; FRANK E. CORRENTE; RICHARD E. AUTIELLO; EDWARD E. VOCCOLA; JOSEPH A. PANNONE; THE CITY OF PROVIDENCE ("Providence"), and various officers, agencies, and entities of Providence, including, but not limited to, the Office of Mayor, the Office of the Director of Administration, the Providence City Solicitor's Office, the Department of Planning and Development, the Providence Redevelopment Agency, the Tax Collector's Office, the Tax Assessor's Office, the Board of Tax Assessment Review, the Finance Department, the Department of Public Safety, the Providence School Department, the Department of Inspection and Standards, and the Building Board of Review; Friends of Cianci, the political organization of DEFENDANT VINCENT A. CIANCI, JR. a/k/a "Buddy"; and Jere Realty, and others known and unknown to the Grand Jury, constituted an "enterprise" as defined by 18 U.S.C. § 1961(4), that is, a group of individuals and entities associated in fact.

[2] The *Redacted Indictment* alleged that nine schemes were committed between 1991 and 1999. All but two of these schemes were alleged to have occurred in the far narrower two to three year period between 1996 and 1999. *Cianci II* at 80-81.

The Tow List, involving alleged pressure placed on tow companies to contribute to Friends of Cianci as a condition of receiving City business, was the only alleged scheme which spanned the entire period. *Id.* at 80.

A second alleged scheme was said to have lasted from 1991 to 1998: the Jere Lease allegation, charging that a local real estate company had paid bribes and kickbacks to Mr. Cianci's co-defendant, Frank Corrente. *Id.*

(Continued on following page)

conspiracy charges, Mr. Cianci himself was alleged to have committed some eighteen felonies, which the indictment realleged as twenty-five predicate acts for the RICO charges.

The single asserted organizing principle of the enterprise was the shared purpose of enriching and empowering its alleged leader, Mr. Cianci, and his campaign organization.[3] Prior to trial, defendants moved to dismiss the RICO

---

All the other schemes alleged were narrow both in nature and time frame, particularly in relation to the breadth of legitimate City business:

- 1998: The Ronci estate, alleging extortion of a $10,000 payment in exchange for a tax abatement. *Id.*
- 1996-1997: The Ise Job, alleging a $5000 payment in exchange for a job in a City department. *Id.*
- 1999: The Freitas Lots, alleging that Mr. Cianci supported sale of two lots to an undercover FBI *provocateur* in exchange for a $10,000 payment. *Id.*
- 1998-1999: The Freitas Lease, alleging an attempt to influence the School Department to grant the FBI undercover agent a lease in exchange for $2000. *Id.* at 80-81.
- 1998: The Freitas Invoices, alleging that co-defendant Corrente facilitated payment of the undercover agent's bills as a City vendor in exchange for $1100. *Id.* at 81.
- 1998: The University Club, alleging that Mr. Cianci attempted to influence the Board of Review to deny a variance requested by a private club which had snubbed him. *Id.*
- 1996: The Maggiacomo job, alleging that co-defendant Autiello conspired with an unnamed public official to facilitate the hiring of Mr. Maggiacomo as a police officer in return for $5000. *Id.*

Mr. Cianci was either not charged, or acquitted, of every one of these substantive allegations.

[3] Paragraph 39 of the *Redacted Indictment* defined the alleged common purpose of the enterprise as follows:

(Continued on following page)

allegations, asserting that the charged enterprise was not an historical entity, but rather an artificial construct shaped to broaden the ambit of evidence and to avoid the insider/outsider dichotomy limned in *Reves v. Ernst & Young,* 507 U.S. 170 (1993). The motion and supporting memorandum asserted that the enterprise alleged was a legal and factual impossibility: the interests of the enterprise components were divergent, indeed, neither the City nor its departments could share in a criminal purpose as a matter of law; and the averments of the *Indictment,* even if believed, failed to establish anything more than *ad hoc* corruption in discrete and often unrelated circumstances. No criminal organization – no modern-day Tamany Hall – was alleged, just a series of criminal acts using City facilities. The motion to dismiss was denied, Vol. 1:39 *et seq.,* but the issues it raised were revisited on motions for judgment of acquittal and for new trial resulting in a written decision, *Cianci I, supra,* and in a Memorandum and Order, dated July 25, 2002.

## B. The Trial

The case went to trial in the District Court for the District of Rhode Island on April 23, 2002. The government pleaded, presented and argued its case on the theory that "the existence of the RICO conspiracy in this case

---

(a) Enriching defendant VINCENT A. CIANCI, JR. a/k/a "Buddy" and Friends of Cianci through extortion, mail fraud, bribery, money laundering, and witness tampering; and

(b) Through the same means enriching, promoting, and protecting the power and assets of the leaders and associates of the enterprise.

may be inferred from the evidence presented regarding the substantive crimes." Vol. 54:12 (government's closing). On June 4, 2002, the trial court granted judgment of acquittal on all counts as to one defendant (Voccola), and, as to the others, granted judgment of acquittal on eight counts of the *Redacted Indictment,* including all of the accusations against Mr. Cianci for the first five years of the alleged RICO conspiracy. Vol. 50:4-16. It then struck the comparable predicate acts. Vol. 54:64-68, 80-81.

As part of his defense, Mr. Cianci sought admission of a tape of a conversation made by the government during its investigation of this case. The conversation occurred in 1995, in the middle of the alleged conspiracy, when a government agent approached Mr. Cianci posing as an air-conditioning businessman seeking a City contract. The tape recorded Mr. Cianci telling the government agent that, if anyone asked for a bribe, he (Mr. Cianci) would "cut his ___ off" and see to it that s/he was arrested. 53:108. The trial court refused to admit this tape, asserting that it was irrelevant hearsay which did not meet the requirements of F.R.Evid. 803(3).

Thereafter, the jury returned verdicts of not guilty on every count against Mr. Cianci, save only a single count of RICO conspiracy. In special verdicts, the jury found the government had failed to prove every one of the RICO predicates in which he was allegedly involved. The only RICO predicates which the jury found to have been proven were two involving co-defendant Frank Corrente and one involving co-defendant Richard Autiello.[4] The government

[4] The substantive RICO-related convictions spanned just two to three years and amounted to approximately $8100. These convictions

(Continued on following page)

never alleged that Mr. Cianci was complicit in any of these acts or had any knowledge of them.

### C. The Appeal

The First Circuit divided on the enterprise issue. The majority opened its analysis by acknowledging that "[c]ourts have divided over the legal standards that guide the drawing of [the] distinction" between an association-in-fact and the pattern of racketeering activity. *Cianci II, supra* at 82. It noted that, while an enterprise must be an ongoing organization, no separate finding of "ascertainable structure" would be required. *Id.* It was enough that enterprise members should share a "common purpose." *Id.* This "common purpose," however, could be derivative where the City and its departments were concerned: "Municipal entities can be part of an unlawful purpose association-in-fact enterprise so long as those who control the entities share the purposes of the enterprise." *Id.* at 83. It adopted the holding of the Ninth Circuit that " 'RICO does not require intentional or 'purposeful' behavior by corporations charged as members of an association-in-fact.' " *Id.*, quoting *United States v. Feldman,* 853 F.2d 648, 657 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989).

---

were four in number, all involving schemes in which Mr. Cianci was not charged:

- Mr. Corrente was convicted of two counts of attempted extortion, which amounted to a single RICO predicate, in relation to the Freitas Lease allegations in 1998-1999, and one count of extortion conspiracy in relation to the Freitas Invoice allegations in 1998;
- Mr. Autiello was convicted of one count of state bribery conspiracy in relation to the Maggiacomo job in 1996.

The majority acknowledged the findings of the District Court that there was no evidence that the City departments actually shared the enterprise's purposes and, further, that none of the predicate acts resulted in any significant disruption of governmental function. *Id.* at 84. However, defendant's position as mayor and the use of City departments as the instruments through which defendants allegedly committed their crimes was deemed sufficient to make the entire City part of an association-in-fact enterprise defined by a shared illicit purpose.

The dissent disagreed, registering concern that utilization of a municipal entity as a tool by the defendants should not be enough to make the City part of an association-in-fact defined by the members' devotion to illegal goals, and noting that membership in an unlawful purpose RICO enterprise is only one step away from becoming targeted as a RICO defendant. *Id.* at 112.

As for the exculpatory tape recording – in which defendant expressed an exculpatory then-existing future intention to an FBI agent posing as a potential City vendor at a time when the government alleged he was conducting City affairs through racketeering[5] – the First Circuit upheld the tape's exclusion under Rule 803(3) on the ground that the Court had "doubt" whether Mr. Cianci meant what he said or, whether, on the contrary, he knew he was speaking to an FBI agent and made the statement

[5] "No one will ask you for a thing. If anybody does, you pick up the phone and call me. I'll cut his ___ off and have him arrested, okay?" Vol. 53:108.

to cover up for past offenses.[6] *Id.* at 106-107. In the First Circuit's view, the sincerity of defendant's statement of intention was a question for the court to decide, not the jury. Thus, if the trial judge concludes that the statement could have been a cover-up (the First Circuit deemed it "unclear" whether it was), the statement may be excluded under Rule 803(3) on the ground that it was "at least in part" backward looking despite its exclusively forward looking terms. *Id.*

## REASONS FOR GRANTING THE PETITION

### I. RICO

The decision below is one of the latest in a long line of Circuit Court opinions attempting to apply this Court's decision in *United States v. Turkette*, 452 U.S. 576 (1981) to an ever-widening spectrum of illicit-purpose association-in-fact enterprises. These decisions have adopted disparate and conflicting approaches to associations-in-fact alleged to consist of a congeries of individual defendants and collective entities, commonly corporations. Such allegations are increasing in frequency, as litigants seek ways to target deep-pocket defendants in the civil arena and to broaden the scope of evidence and liability in criminal cases, while maintaining at least a titular distinction between the defendant and the enterprise and the enterprise and the pattern of racketeering activity.

[6] The Court noted that the statement was "gratuitous" and that petitioner said later on the tape: "[The vendor is] probably an FBI agent." *Cianci II* at 106.

This Court's precedent requires that every 18 U.S.C. § 1962(c) case have three separate components: (1) a person associated with (2) an enterprise who operates its affairs through (3) a pattern of racketeering *See, Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001) (RICO requires distinction between defendant and enterprise); *Turkette, supra* (enterprise is separate and apart from pattern of activity in which it engages). A purely illicit association-in-fact also fits the mold where the criminal association is such that it constitutes an ongoing if *de facto* organization. *Id.* The prosecution here eschewed the classic enterprise model – a lawful-purpose corporation, municipal or private, which becomes the passive instrument or victim of criminals who conduct its affairs through a pattern of racketeering – in favor of an illicit-purpose hermaphrodite comprised of the individual defendants and the municipal entities which they episodically misused.

The core RICO distinctions blur, however, when the enterprise is asserted to be an admixture of criminally-minded persons and the legal-purpose legitimate private corporations or governmental bodies which have the misfortune to employ them. In these circumstances, courts have labored to find standards which remain true to this Court's definition in *Turkette* of an association-in-fact: "A group of persons associated together for a common purpose of engaging in a course of conduct" which may be proven by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Turkette, supra* at 583.

The First Circuit's decision is the most extreme example of an approach adopted by some Circuits, but not

others, to stretch the standards laid down in *Turkette* through the use of a legal fiction: that the illicit purposes of individuals who episodically misuse otherwise lawful entities can be imputed to the entities, thereby causing them to become unwitting members of an illicit-purpose racketeering enterprise. This fiction is said to supply critical elements in a plaintiff's or prosecutor's theory of the case: the fact that the participating entities conduct lawful business as well as unlawful business makes the enterprise distinct from the pattern of racketeering; the aggregation of such entities creates the required distinction between the RICO person and the enterprise as well, even when the person is a corporation. All this is allegedly held together by the fiction of a shared unlawful purpose.

Thus, a company can be sued as a defendant, yet do double duty as the core component of an illegal-purpose enterprise, which the plaintiff or prosecutor can call into existence by imputing the criminal purpose of corporate agents to other entities related by ownership or contract. An agreement to perpetrate a particular criminal scheme can thereby be inflated into an "ongoing organization," *Turkette, supra* at 583, yet avoid the claim that the enterprise is indistinguishable from the pattern because it is set in the context of a legal entity. And plaintiff or prosecutor can introduce evidence which reaches across multiple individuals and organizations with differing, indeed, competing or even conflicting, purposes, on the theory that a common criminal intent can be imputed to otherwise legitimate entities based on the activity of a few corrupt employees.

In dissenting from this conclusion, Circuit Judge Howard called this "a highly ramified decision with implications, criminal and civil, that extend far beyond

this case." *Cianci II, supra* at 111. He referenced then-Judge Breyer's admonition in *Clemente, supra* of "the need to limit 'the potentially boundless scope of the word 'enterprise' so as to distinguish culpable from non-culpable associations.'" *Id.*, quoting *Clemente, supra* at 180-81. And he pointed out that "membership in an unlawful purpose RICO enterprise implies potential culpability under the RICO statute." *Id.*

The Circuits have struggled in this area, employing widely differing approaches with equally differing results. This case presents an opportunity for this Court to bring clarity to this important area of the law in circumstances which present the core issue in stark terms: whether a municipal corporation can be deemed to share the illicit purposes of certain of its officers such that it becomes part of an association-in-fact enterprise under 18 U.S.C. § 1961, when the charged illegal activity was but an infinitesimal part of its overall function.

### A. Varying Approaches

Courts of Appeal have taken varying approaches when plaintiffs or prosecutors have used the "common purpose" language of *Turkette* to link not just individuals, but the legitimate entities for which they work, in an association-in-fact enterprise defined by its illicit purpose. Some Circuits restrict such enterprises to the nexus between the racketeers and their misuse of business facilities, an approach which gives rise to questions whether the enterprise is distinct from the pattern of racketeering. Others view the *legal* activity of the member entities as part of the affairs of the racketeering

enterprise, notwithstanding the fact that the enterprise is defined by its *illegal* aims.

• **Ninth Circuit:** In *United States v. Feldman, supra,* the Ninth Circuit considered an illicit-purpose enterprise alleged to consist of two individuals and seven corporations working for the common purpose of defrauding insurance companies through repeated acts of arson. Certain of the corporations were themselves the targets of the arson, and the proceeds were then moved through a series of financial transactions in order to conceal them from creditors. On a challenge that the corporations could not share an illicit purpose which would require them to "'cannibalize themselves through arson,'" *id.* at 657 (quoting defendant's brief), the Ninth Circuit held that "RICO does not require intentional or 'purposeful' behavior by corporations charged as members of an association-in-fact." *Id.* Indeed, "[i]ndividual corporations may be entirely legitimate and need not benefit from the racketeering; in fact, the criminal activity charged may harm each individual corporation by looting it, or a corporation may be used by the defendant to line his or her pockets." *Id.* (citations omitted). The distinction between enterprise and pattern was not a problem: "The corporate entities had a legal existence separate from their participation in the racketeering, and the very existence of a corporation meets the requirement for a separate structure." *Id.* at 660. This was so even where "[t]he illegal purposes to which [defendant] put [his corporations] were subsidiary to [the] legitimate goal [of making money through legal operations.]" *Id.*

In sum, even in an illicit-purpose enterprise, the licit purposes of the entity members could be used to distinguish RICO person from enterprise and enterprise from pattern.

• **District of Columbia Circuit:** The District of Columbia Circuit took a more nuanced approach to this issue in *United States v. Perlholtz*, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988). There, several individuals, together with multiple corporations, were alleged to constitute an association-in-fact organized to enrich themselves unjustly from the proceeds of government contracts and subcontracts. The Court found that the individual defendants and the multiple corporations shared a common purpose where the individual defendants not only controlled the corporate members of the enterprise, but actually "formed the corporations to further their common objectives." *Id.* at 354. Further, *Perlholtz* was a case where the corporations themselves benefited from the fraud.

• **Sixth Circuit:** The Sixth Circuit took a different line in *Vandenbroeck v. Common Point Mortgage Company, et al.*, 210 F.3d 696 (6th Cir. 2000). In that case, the RICO enterprise was alleged to be an illicit-purpose association-in-fact consisting of a mortgage lender together with the numerous secondary lenders to which it sold its customers' loans. The Court concluded that conspiring to commit a fraud was not enough to trigger the RICO Act if the entities were not otherwise "organized in a fashion that would enable them to function as a racketeering organization for other purposes." *Id.* at 699. Ongoing contractual relations with secondary lenders, *i.e.*, pre-existing licit relations, would not satisfy this requirement.

• **Eighth Circuit:** The Eighth Circuit considered a similar situation, but focused on the problem of a lack of clear distinction between the enterprise and the pattern of racketeering activity. *Stephens, Inc. v. Geldermann*, 962 F.2d 808 (8th Cir. 1992). Plaintiffs there claimed the

existence of an illicit association-in-fact enterprise consisting of a commodity futures firm (also the defendant), an employee of the plaintiffs who triggered the fraud, and certain employees of the defendants who were also complicit. The Court concluded that the only criminal factor linking the parties was their participation in the scheme to defraud. Hence, there was no structure independent of the alleged racketeering activity. The Court rejected the claim that the other legitimate activities of the enterprise members distinguished the enterprise from the pattern of racketeering because "these activities were not in furtherance of the common or shared purpose of the enterprise and, thus, were not acts of the enterprise." *Id.* at 816.

In essence, the Court found that the allegation of an illicit-purpose association-in-fact limited the scope of the enterprise to the nexus between the corrupt individuals and the corporation, *i.e.*, the predicate acts. Hence, the plaintiffs could not use ordinary, everyday legitimate activities of the entity member of the enterprise to satisfy the requirement that the enterprise be distinct from the pattern of racketeering activity.

### B. Decision Below Incorrect

In *Cianci II,* the First Circuit embraced an approach to the alleged RICO enterprise taken originally by the Ninth Circuit in *Feldman* in the context of private corporations, and applied it to a municipal corporation – the City of Providence – and its departments. The majority opinion acknowledges black-letter law which holds that municipalities cannot be deemed to have acted with unlawful intent, *Cianci II, supra* at 83, quoting *Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist.,* 940 F.2d 397,

404 (9th Cir. 1991), *cert. denied,* 502 U.S. 1094 (1992), and that "'criminal activity is private activity even when it is carried out in a public forum and even though the activity can only be undertaken by an official's use of a state given power[.]'" *Id.*, quoting *United States v. Thompson,* 685 F.2d 993, 1001 (6th Cir. 1982), *cert. denied sub nom., Sisk v. United States,* 459 U.S. 1072 (1982). It also concedes that the District Court found specifically that "'there is no evidence that the [City] departments and/or agencies, themselves, shared [the enterprise's] purposes,' . . . and that 'none of defendants' [acts] . . . resulted in any significant disruption of a Governmental function.'" *Id.* at 84, quoting *Cianci I* at 73.

Nevertheless, the First Circuit concludes that an unlawful common purpose can be "imputed" to the City based upon defendants' leadership positions in the City hierarchy. *Id.* at 83. *Feldman* is cited for the proposition that no actual mal-intent is required for the entity members of the enterprise, *id.* at 83, notwithstanding the Court's simultaneous acknowledgement that it would not require proof of an ascertainable structure. *Id.* at 82.[7]

In reaching these conclusions, the First Circuit eschewed the logic of the Sixth Circuit in *Vandenbroeck* and the Eighth Circuit in *Stephens,* which declined to employ pre-existing lawful relations to create the substance of an alleged illegal-purpose association-in-fact enterprise. These Courts have refused to find an enterprise which meets the

---

[7] *Feldman* emanated from a Circuit which now requires proof of an "ascertainable structure" as a separate element of the RICO enterprise, thereby balancing its expansive approach in assigning illicit purposes to otherwise legal business entities. *See, Chang v. Chin,* 80 F.3d 1293 (9th Cir. 1996).

*Turkette* standards in cases alleging illegal-purpose associations-in-fact based upon a thread of criminality woven into a fabric of lawful business. Given the District Court's findings here, the First Circuit had little choice but to acknowledge that the City's actual involvement in any illicit purpose was very limited – limited, indeed, to the alleged predicate acts alone: "Insofar as Cianci's and the other defendants' criminal schemes were or would be carried out by themselves and others acting in their municipal roles, the City – if only to that extent – did share in the same common criminal purpose." *Cianci II* at 85. *See also, id.* at 88. The Circuit thus virtually concedes that the illicit-purpose enterprise – as a nexus between defendants' schemes and the utilization of City resources – was functionally identical to the pattern of racketeering. But the Court elided the lack of distinctiveness by focusing on the backdrop of a much larger volume of ordinary business of city government and the imputation of a wide-ranging illicit purpose based on defendants' leadership positions.

Petitioner suggests that the First Circuit has embraced a fundamental dilution of the *Turkette* requirements that an enterprise be "a group of persons associated together for a common purpose of engaging in a course of conduct" which may be proven by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Turkette, supra* at 583. Simultaneously rejecting the need for an ascertainable structure and permitting common purpose to be a legal fiction where entity members of the enterprise are concerned, the Circuit has opened the door to association-in-fact enterprises which in any given instance have no real world distinction from the RICO persons or the

pattern of racketeering activity. This permits the use of RICO to target deep-pocket entity defendants while simultaneously using these entities as the defining structural element of the enterprise. It authorizes the pleading of the broadest possible enterprise without any genuine historical reality. This, in turn, will allow plaintiffs and the government to avoid the strictures of *Reves* by making outsiders insiders through a stroke of the pen. It also further expands the already broad scope of RICO to sweep in activities of entire entities which have only a filament of illicit connection to the claimed illegal-purpose enterprise, just because they are solidly linked by ongoing contractual relations in the everyday world of commerce and government.

## II. RULE 803(3)

### A. The Conflict

The decision below exacerbates a longstanding conflict among the Circuits as to whether the trial court may assess the credibility of a relevant, contemporaneous statement of future intention under Rule 803(3) and may refuse to admit the statement if the court "doubts" the declarant's sincerity, or whether Rule 803(3) requires the judge to assess contemporaneousness only and to leave the question of the credibility of a contemporaneous statement of intention to the jury.

The First Circuit held below that 803(3) permits the trial court to exclude a statement of future intention if there is reason to "doubt" its *bona fides* and if it is "unclear" whether the statement is a sincere expression of intention or a calculated attempt to cover-up past offenses. *Cianci II* at 106. The Second and Seventh Circuits hold to

the contrary that it is error to exclude a statement of future intention under Rule 803(3) on the ground that the trial judge does not believe the declarant. *E.g., United States v. Peak,* 856 F.2d 825 (7th Cir. 1988); *United States v. DiMaria,* 727 F.2d 265 (2nd Cir. 1984). The Fifth, Sixth and Ninth take a third view, requiring the trial court to assess the reliability of 803(3) statements of intention and to exclude them if made after opportunity for reflection. *E.g., United States v. Reyes,* 239 F.3d 722 (5th Cir.), *cert. denied,* 533 U.S. 961 (2001); *United States v. LeMaster,* 54 F.3d 1224 (6th Cir. 1995), *cert. denied,* 516 U.S. 1043 (1996); *United States v. Ponticelli,* 622 F.2d 985 (9th Cir.), *cert. denied,* 449 U.S. 1016 (1980), *overruled on other grounds, United States v. DeBright,* 730 F.2d 1255, 1259 (9th Cir. 1984).

Commentators have recognized the existence of this multi-tiered conflict for more than a decade. *E.g.,* Saltzburg, *et al.,* 4 *Federal Rules of Evidence Manual* § 803.02[4][d] (8th ed. 2002); Strong, *et al., McCormick on Evidence* § 274, p. 217 n.8 (1999); Valori, Peter, *Special Topics in the Law of Evidence: The Meaning of "Bad Faith" Under the Exceptions to the Hearsay Rule,* 48 U. Miami L.Rev. 481, 482-483 (1993).

This conflict has persisted in large part because this Court has not entered any ruling interpreting Rule 803(3) since the rule was promulgated in 1973. The seminal case is of venerable vintage: *Mutual Life Insurance Co. v. Hillmon,* 145 U.S. 285 (1892). In *Hillmon,* this Court adopted the position later taken by the Second and Seventh Circuits, requiring that the jury alone decide the credibility of a hearsay declaration of present feelings or intentions. *Hillmon, supra* at 296. Other Circuit Courts of Appeals, however, have declined to adopt the *Hillmon*

position under the Rule 803(3). This Court's most recent Rule 803(3) case, *Shepard v. United States,* 290 U.S. 96 (1933), came down in 1933. A brief summary of the development of this rule and relevant precedents follows.

• **Pre-Rule 803(3) United States Supreme Court Precedent:** This Court held in *Mutual Life Insurance Co. v. Hillmon, supra,* that "'[w]henever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence.'" *Id.* at 296, quoting *Insurance Co. v. Mosley,* 8 Wall. 397, 404, 405. "'Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury.'" *Id.*

When such declarations express either beliefs about past facts or feelings experienced in the past, rather than present thoughts and feelings – *e.g.,* "Dr. Shepard poisoned me" – this Court has held that they are inadmissible. *Shepard, supra.* "Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to past." *Id.* at 105-106.

This Court has indicated that, where a hearsay declaration incorporates both present intentions and underlying past facts, both are admissible under the state-of-mind hearsay exception. *Hillmon, supra* at 288-289, 299-300 (holding admissible letters conveying both an intention and the underlying facts from which the intention arose).

• **Rule 803(3):** Rule 803(3) was enacted in 1973. Its mandate is categorical, like the exception for co-conspirator hearsay in F.R.Evid. 801(d)(2)(E). By its terms,

it admits all hearsay describing a "then existing state of mind, . . . (such as intent, . . . )", without authorizing the trial court to assess the credibility or trustworthiness of the statement as a precondition for admissibility. The Rule excludes only those statements which are not really declarations of a "then existing" mental state, *i.e.*, hearsay which looks backward, purporting "to prove the fact remembered or believed" through a hearsay "statement of memory or belief," *e.g.*, "Dr. Shepard poisoned me." F.R.Evid. 803(3); *Shepard, supra* at 98.

Thus, on its face, Rule 803(3) gives the question of the credibility of a hearsay declaration of a then-existing state of mind to the jury, just as this Court did in *Hillmon*.

• **Conflict Among the Circuits:** The First Circuit held below that the trial court was authorized to exclude state-of-mind hearsay from evidence based on "doubt" and lack of clarity concerning the declarant's sincerity, thereby taking the issue of the declarant's credibility from the jury and giving it to the trial court as gatekeeper under Rule 803(3).[8] *Cianci II* at 106-107.

The Second and Seventh Circuits take the opposite view. The Seventh Circuit has held that "the district court, which has broad discretion in evidentiary matters, does not have discretion to exclude testimony because the judge

[8] Although the First Circuit postured this as a holding that the hearsay was "at least in part" backward looking, it is clear that the Court so held only because it doubted whether defendant was reporting his future intention honestly and concluded that he might instead have been fabricating his intentions in an effort to cover-up the past. On its face, the statement had nothing to do with the past ("No one will ask you for a thing. If anybody does, you pick up the phone and call me. I'll cut his ___ off and have him arrested, okay?" 53:108).

does not believe the witness." *United States v. Peak, supra* at 834. The Seventh Circuit reversed defendant's conviction in *Peak* on the ground that the trial court committed prejudicial error when it excluded hearsay concerning defendant's state of mind under Rule 803(3) on the ground that the hearsay was not trustworthy. *Id.*

The Second Circuit likewise requires that the jury decide whether a hearsay declarant's is credible under Rule 803(3), even where the proffered testimony is the "self-serving" hearsay of a criminal defendant. *United States v. Lawal,* 736 F.2d 5 (2nd Cir. 1984); *United States v. DiMaria,* 727 F.2d 265 (2nd Cir. 1984). Responding to the Government's insistence that defendant's hearsay statement constituted "'an absolutely classic false exculpatory statement,'" Judge Friendly responded in *DiMaria*: "False it may well have been but if it fell within Rule 803(3), as it clearly did if the words of that rule are to mean what they say, its truth or falsity was for the jury to determine." *DiMaria, supra* at 271.

The Fifth, Sixth and Ninth Circuits fall somewhere between the ruling of the First Circuit in this case and the contrary holdings of the Seventh and Second Circuits. These Circuits authorize the trial court to assess the circumstances under which the declaration was made in an effort to insure trustworthiness. The most commonly cited standard is limned by the Ninth Circuit in *United States v. Ponticelli, supra* at 991: "In making the foundational inquiry on admissibility under [Rule 803(3)], the court must evaluate three factors: contemporaneousness, chance for reflection, and relevance." *Accord, e.g., United States v. Reyes, supra*; *United States v. LeMaster, supra*.

Under the *Ponticelli* rubric, the question of credibility is subsumed in an inquiry into circumstances calculated to insure credibility, *i.e.*, the lack of time for reflection.[9] According to the Ninth Circuit, a declaration of state of mind has probative value "because the declarant presumably has no chance for reflection and therefore for misrepresentation. . . . The greater the circumstances for misrepresentation, the less reliable is the declaration." *Ponticelli, supra* at 991 (citations omitted). The Fifth, Sixth and Ninth Circuits authorize the trial court to exclude state-of-mind hearsay if the court concludes that declarant had time to reflect before making the statement, thereby rendering the statement unreliable. *Id.; Reyes, supra; LeMaster, supra.* The rationale underlying these holdings appears to be that "spontaneity is the principal, and often the only, guarantee of trustworthiness for the exceptions in this chapter, . . . " *McCormick, supra* at § 270, p. 198.

An inquiry into whether the declarant had time to reflect is similar to, but not the same as, an inquiry into the declarant's credibility. The former looks at objective circumstances in an effort to insure subjective trustworthiness, while the latter assesses subjective credibility itself. *See, United States v. Arthur,* 949 F.2d 211, 217 (6th Cir. 1991) (Gibbons, J. concurring) (noting that some courts distinguish between the court's role in assessing a

---

[9] The other two prongs of this standard are not at issue here. "Contemporaneousness" concerns any time lapse between the experience of the feeling or intention and its hearsay expression. *Ponticelli, supra* at 991. "Relevance" concerns whether state of mind is a material issue in the case at the time the statement was made, or whether circumstances change between the time that state of mind is relevant and the time the statement is made. *Id.*; *McCormick, supra* at § 274.

hearsay statement's reliability and the jury's role in determining its credibility). The Seventh Circuit holds that the trial court must assess time for reflection (objective trustworthiness) as a precondition to admissibility under Rule 803(3), *United States v. Jackson*, 780 F.2d 1305, 1314 (7th Cir. 1986), while the subjective credibility of the declarant remains a question for the jury. *United States v. Peak, supra*. The Fifth Circuit, by contrast, authorizes the trial court to consider both objective and subjective indicia of trustworthiness. *United States v. Reyes, supra* at 743 (upholding exclusion of defendant's state-of-mind hearsay on the ground that he had a chance to reflect and that it was "likely" that defendant's recorded remarks "were more self-serving than they were candid.").

The Circuit Courts of Appeals have thus adopted multiple conflicting approaches to the question whether the court or the jury must consider the trustworthiness of state-of-mind hearsay under Rule 803(3). This question is important and likely to recur largely because this Court has not spoken concerning Rule 803(3) since its passage more than thirty years ago. Further, the 803(3) exception mirrors its close cousins, Rules 803(1) (hearsay exception for present sense impression) and 803(2) (hearsay exception for excited utterances), both of which exclude any trustworthiness qualifier just as Rule 803(3) does. Any confusion concerning the role of the jury in relation to questions of credibility under Rule 803(3) is therefore likely to spill over onto 803(3)'s companions as well. *Ponticelli, supra* at 991 (foundational inquiry is identical under Rules 803(1)(2) and (3)).

### B. Decision Below Incorrect

The unambiguous terms of Rule 803(3) reject the position the First Circuit has taken. Rule 803(3) also belies decisions in the Fifth, Sixth and Ninth Circuits, which create grounds for excluding state-of-mind hearsay which appear nowhere in the Rule itself. The correct approach is that of the Second and Seventh Circuits, which entrusts questions concerning the credibility of the hearsay declarant under Rule 803(3) to the jury.

*First*, Rule 803(3) does not include any provision authorizing the trial court to assess state-of-mind hearsay for either objective or subjective "trustworthiness" or "credibility" as a precondition for admissibility. To the contrary, the Rule admits every "statement of the declarant's then existing state of mind" as long as it is not a statement of memory or belief offered to prove the fact remembered or believed.

*Second*, the omission of any "trustworthiness" or "credibility" qualifier in Rule 803(3) must be deemed intentional. Rule 803(3) declined to adopt the American Law Institute's *Model Code of Evidence* (1942) provision permitting exclusion of such statements if made "in bad faith." *Model Code of Evidence*, Rule 513, p. 264 (1942). At the same time, the drafters of the Federal Rules *did* require courts to consider the "trustworthiness" of other hearsay exceptions as preconditions for admissibility. *E.g.*, Rules 803(6)(7)(8); 804(b)(3) (all requiring the court to exclude otherwise admissible hearsay if the circumstances indicate "lack of trustworthiness"). Black letter rules of statutory construction mandate that the omission of "trustworthiness" language in Rule 803(3) must be considered deliberate and given full effect, particularly where

the drafters included "trustworthiness" language in parallel hearsay exceptions. *Russello v. United States*, 464 U.S. 16, 23 (1983).

*Third*, the drafters intended that this Court's holding in *Hillmon*, *supra* would be "of course, left undisturbed." 1972 Advisory Committee Note to Rule 803(3). *Hillmon* propounded the rule that "'truth or falsity [of declarations of intention] is an inquiry for the jury.'" *Hillmon*, *supra* at 296, quoting *Insurance Co. v. Mosley*, *supra* at 404, 405.

*Fourth*, commentators agree with petitioner that the credibility of state-of-mind hearsay must be determined by the jury. "The chief problem with [excluding state-of-mind hearsay for lack of sincerity] . . . is legislative intent. The rules give no authorization to such considerations, and indeed the omission of a requirement found in the original Uniform Rule that the statement must not be made in 'bad faith' indicates a contrary legislative intent." *McCormick on Evidence*, *supra* at § 270, p. 199 (fns. omitted). *Accord*, 4 *Federal Rules of Evidence Manual*, *supra* at § 803.02[4][d], p. 803-30; 48 U. Miami L.Rev. 481, *supra*. "The lack of sincerity in [a self-serving statement of an innocent state of mind by a criminal defendant] can easily be understood by the jury, so it makes little sense for the Trial Judge to exclude the statement on trustworthiness grounds where to do so is contrary to the language of Rule 803(3)." 4 *Federal Rules of Evidence Manual*, *supra* at p. 803-31.

*Fifth*, the fact that Rule 803(3) does not authorize exclusion of doubtful state of mind hearsay does not mean the trial court can never consider bad faith or lack of sincerity when deciding whether to admit such evidence. The court can exclude any state-of-mind hearsay that

meets the standards of Rule 403, *i.e.*, where the declarant's credibility is so questionable that the probative value of the declaration is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, . . . "[10] F.R.Evid. 403. This is the approach contemplated by the Federal Rules. *E.g., United States v. Miller*, 874 F.2d 1255 (9th Cir. 1989); *Peak, supra* at 834 n.6; 5 *Weinstein's Federal Evidence* § 803.07[4] (2nd ed. 2002); 4 *Federal Rules of Evidence Manual, supra* at p. 803-31.

[10] The First Circuit did not rest on Rule 403 here. The Court upheld the exclusion of the exculpatory tape exclusively under Rule 803(3) on the ground of "doubt" and lack of clarity as to defendant's sincerity, without considering whether the probative value of the doubted evidence was "substantially outweighed" by the danger of prejudice or confusion under Rule 403. *Cianci II* at 106-107.

## CONCLUSION

The decision of the United States Court of Appeals for the First Circuit conflicts with decisions from this Court and other Circuit courts, and presents significant questions of federal law not previously decided by this Court. Petitioner therefore asks this Court to grant his petition seeking a writ of certiorari.

Respectfully submitted,

JOHN A. MACFADYEN
*Counsel of Record*
MACFADYEN, GESCHEIDT & O'BRIEN
The Owen Building
101 Dyer Street
Providence, RI 02903
(401) 751-5090

*Attorney for Petitioner*
*Vincent A. Cianci, Jr.*

## APPENDIX A

**UNITED STATES OF AMERICA, Appellee, v. VINCENT A. CIANCI, JR., FRANK E. CORRENTE, and RICHARD E. AUTIELLO, Defendants, Appellants.**

**Nos. 02-2158, 02-2159, 02-2165, 02-2166, 02-2288**

**UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

***378 F.3d 71; 2004 U.S. App. LEXIS 16421; 64 Fed. R. Serv. (Callaghan) 1208***

**August 10, 2004, Decided**

**COUNSEL:** John A. MacFadyen, for appellant Vincent A. Cianci, Jr.

Anthony M. Traini, for appellant Frank E. Corrente.

Richard C. Bicki with whom Cerilli & Bicki and Edward Gerstein were on brief for appellant Richard E. Autiello.

Donald C. Lockhart, Assistant United States Attorney with whom Margaret E. Curran, United States Attorney, Richard W. Rose and Terrence P. Donnelly, Assistant United States Attorneys were on brief, for appellee.

**JUDGES:** Before HOWARD, Circuit Judge, CAMPBELL and STAHL, Senior Circuit Judges.

**OPINION BY:** STAHL

**OPINION: STAHL, Senior Circuit Judge.** Vincent A. Cianci was the Mayor of Providence, Rhode Island; Frank E. Corrente was the City's Director of Administration; Richard E. Autiello was a member of the Providence City Towing Association, a private organization. Between

April 23 and June 24, 2002, the three were jointly tried on a superseding indictment that charged them and others with forty-six violations of federal statutes prohibiting public corruption. The district court entered judgments of acquittal on eight of the charges but submitted the rest to the jury.

On June 24, 2002, the jury returned a total of eight guilty verdicts but acquitted on the remaining thirty counts. All three defendants were convicted on a single count charging a conspiracy to violate the RICO (Racketeer Influenced and Corrupt Organizations) statute. *See* 18 U.S.C. § 1962(d). Corrente and Autiello were convicted on a count charging a federal bribery conspiracy. *See* 18 U.S.C. §§ 371 & 666(a)(1)(B). Corrente was convicted on a count charging a substantive RICO violation, *see* 18 U.S.C. § 1962(c), two counts charging Hobbs Act extortion conspiracies, *see* 18 U.S.C. § 1951(a), and two counts charging Hobbs Act attempted extortions, *see id.* Autiello was convicted on an additional count charging a second federal bribery conspiracy. *See* 18 U.S.C. §§ 371 & 666(a)(1)(B). The jury also answered "YES" to four of thirty-seven special interrogatories, which asked whether the government had "proven" the alleged predicate acts underlying the racketeering counts; all other special interrogatories were answered "NO" or not answered at all.

The district court subsequently granted a judgment of acquittal on one of the extortion conspiracy charges of which Corrente had been convicted; ordered the forfeiture of $250,000 in a campaign contribution fund controlled by Cianci and Corrente pursuant to RICO's forfeiture provisions, *see* 18 U.S.C. § 1963(a)(1); and sentenced the defendants to prison terms of sixty-four months (Cianci), sixty-three months (Corrente), and forty-six months (Autiello).

Cianci, Corrente, and Autiello appeal their convictions and sentences, and Cianci and the government cross appeals the district court's forfeiture ruling. We begin with challenges to defendants' RICO convictions.

## I. The RICO Convictions (All Defendants)

### A. Indictment

Count One of the indictment charged Cianci, Autiello, and Corrente with conspiracy to operate the affairs of an enterprise consisting of the defendants themselves, the City of Providence, "various officers, agencies and entities of Providence" including thirteen specified agencies, Jere Realty, and Friends of Cianci, and others "known or unknown to the Grand Jury." The purpose of the enterprise "included the following: a. Enriching Defendant Vincent A. Cianci . . . Friends of Cianci through extortion, mail fraud, bribery, money laundering, and witness tampering, and b. Through the same means enriching, promoting and protecting the power and assets of the leaders and associates of the enterprise." In a pre-trial motion, defendants moved to dismiss the RICO allegations, asserting that the enterprise as charged was improper in that it was overly broad, vague, and legally impossible.[1] The district court denied the motion. The issues raised by this motion were revisited on motions for judgment of acquittal and for a new trial. The court denied these motions as well.

Defendants argue that the enterprise charged in the indictment was purposefully obscure and did not provide

[1] We address this legal impossibility argument later in the context of whether sufficient evidence supported the charged RICO enterprise.

adequate notice to defendants of the crimes for which they were charged and ultimately convicted. The argument is couched in two ways: that 18 U.S.C. § 1961(4) is unconstitutional as applied for failure to provide "fair warning" of the alleged criminal conduct and that the charged enterprise failed to provide adequate notice against which the defendants could defend themselves. The government counters that, under the RICO statute, enterprise is defined broadly and that defendants were sufficiently apprised of the nature and extent of the charges.

RICO makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity[.]" 18 U.S.C. § 1962(c). The statute also outlaws conspiracies to violate § 1962(c). *See id.* § 1962(d). As stated above, Corrente was convicted of a substantive violation of § 1962(c), and all three defendants were convicted of RICO conspiracy under § 1962(d).

A RICO "enterprise" "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). *See United States v. DeCologero*, 364 F.3d 12, 18 (1st Cir. 2004). It is important to stress that the Supreme Court has admonished that RICO and the term "enterprise" be construed expansively. *See United States v. Turkette*, 452 U.S. 576, 586-87, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497-98, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985); *see also United States v. London*, 66 F.3d 1227, 1243-44 (1st Cir. 1995); *United States v. Lee Stoller Enterprises, Inc.*, 652 F.2d

1313, 1318 (7th Cir. 1981). The term's flexibility is denoted by the use of the word "includes" rather than "means" or "is limited to"; it does not purport to be exhaustive. *See United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991) (*Posner, J.*); *United States v. Perholtz*, 268 U.S. App. D.C. 347, 842 F.2d 343, 353 (D.C. Cir. 1988). Accordingly, "enterprise" has been interpreted *inter alia* to include (1) legal entities such as legitimate business partnerships and corporations, and (2) illegitimate associations-in-fact marked by an ongoing formal or informal organization of individual or legal-entity associates, *see London*, 66 F.3d at 1243-44 (associations-in-fact may include legal entities such as corporations), who or which function as a continuing organized crime unit "for a common purpose of engaging in a course of conduct." *Turkette*, 452 U.S. at 580-83; *see also United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001), *cert. denied*, 535 U.S. 910, 152 L. Ed. 2d 152, 122 S. Ct. 1215 (2002). The enterprise charged in this case is of the latter, associated-in-fact variety.

Here, the superseding indictment delineated the members of the enterprise, the roles of the defendants in the enterprise, the purposes and goals of the racket, and the ways in which the defendants used other members of the enterprise – specifically, municipal entities that they controlled as part of the conspiracy – to further those purposes and goals. It alleged that defendants conspired to violate and did in fact violate RICO through their involvement in an associated-in-fact enterprise devoted to enriching and empowering defendants and others through unlawful means. The enterprise was alleged to have been comprised of the individual defendants; the City of Providence "including, but not limited to" many of its departments, offices, and agencies; the campaign contribution

fund controlled by Cianci and Corrente; and others known and unknown to the grand jury. The enterprise allegations, which we reproduce as redacted following the district court's entry of the eight judgments of acquittal prior to the jury charge, read as follows:

> THE RACKETEERING ENTERPRISE
>
> Defendants VINCENT A. CIANCI, JR., a/k/a "Buddy"; FRANK E. CORRENTE; RICHARD E. AUTIELLO; the City of Providence ("Providence"), including, but not limited to, the Office of Mayor, the Office of the Director of Administration, the Providence City Solicitor's Office, the Department of Planning and Development, the Providence Redevelopment Agency, the Tax Collector's Office, the Tax Assessor's Office, the Board of Tax Assessment Review, the Finance Department, the Department of Public Safety, the Providence School Department, the Department of Inspection and Standards, and the Building Board of Review; Friends of Cianci, the political organization of Defendant VINCENT A. CIANCI, JR., a/k/a "Buddy"; and others known and unknown to the Grand Jury, constituted an "enterprise" as defined by 18 U.S.C. § 1961(4), that is, a group of individuals and entities associated in fact. This enterprise, which operated in the District of Rhode Island and elsewhere, was engaged in, and its activities affected interstate commerce.
>
> PURPOSES OF THE ENTERPRISE
>
> The purposes of the enterprise included the following:
>
> a. Enriching Defendant VINCENT A. CIANCI, JR., a/k/a "Buddy" and Friends of Cianci through extortion, mail fraud, bribery, money laundering, and witness tampering; and

> b. Through the same means enriching, promoting, and protecting the power and assets of the leaders and associates of the enterprise.
>
> DEFENDANTS AND THEIR ROLES IN THE ENTERPRISE
>
> Defendants VINCENT A. CIANCI, JR., a/k/a "Buddy;" and FRANK E. CORRENTE were the leaders of the enterprise. . . .
>
> Defendant RICHARD E. AUTIELLO, and others known and unknown to the Grand Jury, were associated with, and conducted and participated, directly and indirectly, in the conduct of the enterprise's affairs, including but not limited to extortion, mail fraud, and bribery.

Superseding Redacted Indictment, ¶¶ 38-41. This enterprise was alleged to have existed "from in or about January 1991 through in or about December 1999."

The balance of the indictment (again, in the redacted form in which it went to the jury) also detailed the "pattern of racketeering activity" underlying the grand jury's RICO and RICO conspiracy allegations. The unlawful conduct comprising the alleged pattern was set forth in a section detailing the predicate RICO "Racketeering Acts" and in separate offense counts. The pattern was itself subdivided into nine alleged schemes:

> 1. A scheme, carried out between 1991 and late 1999, in which Corrente (with Autiello serving as his intermediary) pressured companies with whom the Providence Police Department contracted for towing services to make campaign contributions totaling some $250,000 to Friends of Cianci in order to remain on the tow list ("the Tow List scheme");

2. A scheme, carried out between 1991 and 1998, in which the owner of Jere Realty, a local real estate company, was alleged to have paid bribes and kickbacks which made their way to Corrente in order to secure a Providence School Department lease for one of the company's Providence buildings ("the Jere Lease scheme");

3. A 1998 scheme in which Cianci was alleged to have been involved in extorting a $10,000 contribution from the estate of Fernando Ronci (which owed the City some $500,000 in back taxes) in exchange for his support in the estate's efforts to secure a tax abatement from the corrupt Board of Tax Assessment Review, which was chaired by co-conspirator Joseph Pannone and vice-chaired by co-conspirator David Ead ("the Ronci Estate scheme");

4. A 1996-97 scheme in which Cianci was alleged to have arranged for Christopher Ise to obtain a job in the City's Department of Planning and Development in return for a $5,000 contribution ("the Ise Job scheme");

5. A 1999 scheme in which Cianci was alleged to have supported the contemplated sale of two City lots to a City vendor, Anthony Freitas, in return for a $10,000 contribution ("the Freitas Lots scheme");

6. A 1998-99 scheme in which Corrente was alleged to have attempted to influence the Providence School Department to encourage a city contractor entitled to reimbursement from the City for its lease expenses to lease a building owned by Anthony Freitas in return for contributions totaling $2,000 ("the Freitas Lease scheme");

7. A 1998 scheme in which Corrente, acting through Joseph Pannone, was alleged to have facilitated prompt payments of invoices submitted to the City by a business owned by Anthony Freitas in return for contributions totaling $1,100 ("the Freitas Invoices scheme");

8. A 1998 scheme in which Cianci was alleged (a) to have attempted to influence the City's Building Board of Review to deny a request for construction variances made by the private University Club in retaliation for the Club's having refused to admit him as a member back in the 1970s and its continuing refusal to admit him, and (b) to have extorted a free honorary membership from the Club as the construction variance dispute was unfolding ("the University Club scheme"); and

9. A 1996 scheme in which Autiello conspired with an unnamed public official to facilitate the hiring of Joseph Maggiacomo as a Providence police officer in return for a $5,000 cash contribution by Joseph's mother, Mary Maggiacomo ("the Maggiacomo Job scheme").

"[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974). "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'" *Id.* (citations omitted);

*see also United States v. McDonough*, 959 F.2d 1137, 1140 (1st Cir. 1992).

The indictment not only tracks the language of the RICO statute, but also goes into considerable detail with respect to the underlying factual allegations. Hence, we conclude that defendants were more than sufficiently apprised of the charges.

B. Enterprise

The defendants also argue that their RICO convictions cannot stand because there was insufficient evidence to ground the jury's foundational finding that the government had proved the existence of the RICO "enterprise" that the government charged.[3] We begin our analysis by summarizing the relevant legal principles and the government's RICO theory and proof.

In cases involving an alleged associated-in-fact RICO enterprise, the existence of the charged enterprise does not follow, ipso facto, from evidence that those named as the enterprise's associates engaged in crimes that collectively may be characterized as a "pattern of racketeering activity":

> While the proof used to establish these separate elements [i.e., the "enterprise" and the "pattern of racketeering activity"] may in particular

[3] The indictment and the jury instructions required that the government prove the same enterprise, described below, in order to secure convictions on both the substantive RICO count and the RICO conspiracy count. The analysis that follows therefore applies with equal force to the substantive RICO conviction returned against Corrente and to the RICO conspiracy convictions returned against Cianci, Corrente, and Autiello.

> cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

*Turkette*, 452 U.S. at 583. In other words, criminal actors who jointly engage in criminal conduct that amounts to a pattern of "racketeering activity" do not automatically thereby constitute an association-in-fact RICO enterprise simply by virtue of having engaged in the joint conduct. Something more must be found – something that distinguishes RICO enterprises from ad hoc one-time criminal ventures. *See Bachman v. Bear Stearns & Co., Inc.*, 178 F.3d 930, 932 (7th Cir. 1999) (Posner, C.J.) (noting that a contrary rule would erroneously make "every conspiracy to commit fraud . . . a RICO [enterprise] and consequently every fraud that requires more than one person to commit . . . a RICO violation").

Courts have divided over the legal standards that guide the drawing of this distinction. Some require proof that an alleged associated-in-fact enterprise have an "ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity . . . , which might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes." *Patrick*, 248 F.3d at 18 (*quoting United States v. Bledsoe*, 674 F.2d 647, 664 (8th Cir. 1982), and discussing cases from other circuits that have adopted *Bledsoe's* "ascertainable structure" standard) (internal quotation marks omitted). Courts following the

"ascertainable structure" approach do so out of concern that the factfinder not be misled into "collapsing . . . the enterprise element with the separate pattern of racketeering activity element of a RICO offense." *Id.* (*quoting Bledsoe*, 674 F.2d at 664) (internal quotation marks omitted).

This circuit has cast its lot with courts that have declined to make *Bledsoe's* "ascertainable structure" criterion a mandatory component of a district court's jury instructions explaining RICO associated-in-fact enterprises. *See id.* at 18-19. Instead, we have approved instructions based strictly on *Turkette's* explanation of how a criminal association might qualify as a RICO enterprise. *See, e.g., Patrick*, 248 F.3d at 17-19. In doing so, we have read *Turkette* to impose a requirement that those associated in fact "function as an ongoing unit" and constitute an "ongoing organization." *Id.* at 19. Also important to such an enterprise is that its members share a "common purpose." *See, e.g., id.*; *Ryan v. Clemente* [sic], 901 F.2d 177, 180 (1st Cir. 1990) ("Although much about the RICO statute is not clear, it is very clear that those who are 'associates' . . . of a criminal enterprise must share a 'common purpose'. . . .") (citations omitted).

We turn now to the particulars of the defendants' argument. First, they contend that the indictment charged a legal impossibility in alleging that municipal entities were themselves part of the unlawful purpose associated-in-fact enterprise. They base this argument on the requirement that members of such an enterprise share a common unlawful purpose and cases holding that municipalities cannot be found to have acted with unlawful intent. *See, e.g., Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991) ("[G]overnment entities are incapable of forming a malicious intent.");

*United States v. Thompson*, 685 F.2d 993, 1001 (6th Cir. 1982) ("Criminal activity is private activity even when it is carried out in a public forum and even though the activity can only be undertaken by an official's use of a state given power[.]").

Defendants' argument misses the mark because neither the indictment nor the jury instructions compel the conclusion that the City itself had to have formed an unlawful intent. It is uncontroversial that corporate entities, including municipal and county ones, can be included within association-in-fact RICO enterprises. *See, e.g.*, *London*, 66 F.3d at 1244; *Masters*, 924 F.2d at 1366. It is also beyond dispute, as the Supreme Court held in *Turkette*, that "the term 'enterprise' as used in RICO encompasses both legitimate and illegitimate enterprises." 452 U.S. at 578. As the D.C. Circuit elucidated:

> [A restrictive] reading of 1961(4) would lead to the bizarre result that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO. [Such an] interpretation hardly accords with Congress' remedial purposes: to design RICO as a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless.

*Perholtz*, 842 F.2d at 353. Municipal entities can be part of an unlawful purpose association-in-fact enterprise so long as those who control the entities share the purposes of the enterprise. "RICO does not require intentional or 'purposeful' behavior by corporations charged as members of an association-in-fact." *United States v. Feldman*, 853 F.2d 648, 657 (9th Cir. 1988). A RICO enterprise animated by an illicit common purpose can be comprised of an association-in-fact of municipal entities and human members

when the latter exploits the former to carry out that purpose. Cianci, Corrente, and Autiello – those who wielded influence, exerted pressure, and effectively controlled the City's various components – are the criminals here. Defendants' legal impossibility argument holds water only had the government sought prosecution of the City itself. The City and its component agencies are not the defendants in this case; they were deemed members of the enterprise because without them, Cianci, Corrente, and Autiello would not have been able to even attempt to perpetrate the charged racketeering schemes. Indeed, this is not the first time an association-in-fact enterprise composed in this manner has been found to exist. *See, e.g.*, *Masters*, 924 F.2d at 1362; *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994) (upholding association-in-fact enterprise consisting of congressman, his two offices, and congressional subcommittees that he chaired); *United States v. Dischner*, 974 F.2d 1502 (9th Cir. 1992) (upholding association-in-fact enterprise consisting of municipal officials, office of mayor, and department of public works); *United States v. Angelilli*, 660 F.2d 23, 31-33 (2d Cir. 1981) ("We view the language of § 1961(4), . . . as unambiguously encompassing governmental units, . . . and the substance of RICO's provisions demonstrate a clear congressional intent that RICO be interpreted to apply to activities that corrupt public or governmental entities."). In each of these cases, the groupings of individuals and corporate or municipal entities were sufficiently organized and devoted to the alleged illicit purposes that the resulting whole functioned as a continuing unit. The common purpose was dictated by individuals who controlled the corporate or municipal entities' activities and manipulated them to the desired illicit ends.

The indictment and jury instructions are consistent with this framing of the enterprise. The district court instructed the jury, without objection from either party, that "the Government must prove that the alleged enterprise had an ongoing organization, whether it be formal or informal, and that its various associates functioned together as a continuing unit to achieve common goals." The court continued, "It is not necessary in proving the existence of an enterprise to show that each member of the enterprise participated in or even knew of all of its activities, but it is necessary to show that all members of the alleged enterprise shared a common purpose." Requiring the government to prove that all members named in the enterprise shared a common purpose of illegality did not compel the government to show that the City itself had the mens rea to seek bribes and to extort. The Ninth and Sixth Circuits articulated what in some sense is the obvious: that a corporate or municipal entity does not have a mind of its own for purposes of RICO. *Lancaster Comm. Hosp.*, 940 F.2d at 404; *Thompson*, 685 F.2d at 1001. Unlawful common purpose is imputed to the City by way of the individual defendants' control, influence, and manipulation of the City for their illicit ends. Whether the defendants did exercise sufficient control over the City for purposes of the enterprise is one of fact for the jury and evidentiary sufficiency.

It follows that the defendants also have an evidence-based argument. They contend that their RICO convictions must be reversed because the evidence introduced at trial in support of the alleged schemes set forth above – the only proof from which the jury might have inferred that the schemes were carried out, or were intended to be carried out, by means of a RICO enterprise, *see Turkette*,

452 U.S. at 583 (observing that proof of the pattern of racketeering activity may in particular cases also constitute the proof of the enterprise itself) – was insufficient to ground a finding that the schemes were conducted through the specific entity alleged in the indictment to have constituted a RICO enterprise. Defendants base this argument on an assertion that there was no evidence from which the jury might have inferred a shared purpose between defendants and the municipal entities named as associates of the enterprise and through which many of the schemes were conducted. In support of this argument, the defendants point to specific statements by the district court that "there is no evidence that the [City] departments and/or agencies, themselves, shared [the enterprise's] purposes," *United States v. Cianci*, 210 F. Supp. 2d 71, 73 (D.R.I. 2002) (denying defendants' motions for judgments of acquittal), and that "none of [defendants'] acts . . . resulted in any significant disruption of a Governmental function." *Id.* The defendants also emphasize that, even if we were to evaluate the sufficiency of the evidence underlying the RICO convictions by construing the entire record in the light most favorable to the government, the evidence is insufficient.

As set forth above, we have identified *Turkette's* "ongoing organization," "continuing unit," and "common purpose" requirements as the principal tools a factfinder should use to distinguish a RICO enterprise from an ad hoc criminal confederation. We have applied these requirements to unlawful purpose associations-in-fact involving corporate legal entities. *See London*, 66 F.3d at 1243-45. The district court adequately set out these requirements to the jury; hence, we see no basis for disregarding the court's instructions in the course of our sufficiency review. *See, e.g.*,

*United States v. Zanghi*, 189 F.3d 71, 79-80 (1st Cir. 1999) (an unchallenged jury instruction that is faithful to the indictment and "not patently incorrect or internally inconsistent" becomes the standard by which evidentiary sufficiency is to be measured) (*citing United States v. Gomes*, 969 F.2d 1290, 1294 (1st. Cir. 1992)).

After careful scrutiny of the record and setting the evidence against the jury instructions, we conclude that the jury could have found the above requirements, specifically that the defendants and others named as enterprise members comprised an ongoing organization that functioned as a continuing unit and was animated by common purposes or goals.

We agree with the government's assertion that the jury's enterprise finding is sustainable because there was sufficient evidence that Cianci and Corrente exercised substantial control over the municipal entities named as members of the enterprise. Cianci was the City's mayor and Corrente its chief of administration. They were alleged and were shown to have used their positions and influence to sell municipal favors on a continuing basis. The evidence indicates a close relationship "in fact" among them, the City they managed, and Cianci's political organization. Cianci, as mayor, and Corrente and Autiello, as city officials, were strongly connected to and had considerable influence over the various City employees and departments. Their illegal schemes could function only with the cooperation, witting or unwitting, of certain City agencies and officials. Insofar as Cianci's and the other defendants' criminal schemes were or would be carried out by themselves and others acting in their municipal roles,

the City – if only to that extent – did share in the same common criminal purpose.[3] The defendants were not only human members of the enterprise, but were the City's official leaders with considerable express and implicit authority over its departments and employees. Moreover, the enterprise's corrupt purposes were aimed at exploiting the City's resources. It is because of this control and these close connections that the jury could have imputed the enterprise's common purpose to the City. *See Masters*, 924 F.2d at 1366 ("Surely if three individuals can constitute a RICO enterprise, . . . ,then the larger association that consists of them plus entities that they control can be a RICO enterprise too.").

Evidence of defendants' control, both titular and actual, was sufficient to deem the enterprise a "continuing unit" and "ongoing organization." The jury could easily

---

[3] The evidence depicted a behavioral spectrum ranging from innocent cooperation to willful complicity in unlawful conduct. For example, with respect to the Freitas Invoices scheme, the evidence was merely that an employee within the City's Finance Department (Lorraine Lisi), acting at Corrente's request, paid valid invoices more promptly than usual. Similarly, with respect to the Ise Job scheme, the evidence was merely that the Deputy Director of the Department of Planning and Development (Thomas Deller) created a temporary position for Ise within the department at Cianci's request. At the more culpable end of the spectrum, however, there was evidence that, in connection with the Jere Lease scheme, the head of the Department of Public Property (Alan Sepe) and the Director of Business Relations for the School Department (Mark Dunham) were influenced by Corrente to tailor the specifications in a School Department lease bid to fit the dimensions of Jere Realty's building, and then to support the Jere Realty lease before the Board of Contract and Supply (which was the entity formally empowered to accept or reject bids of City contracts). Similarly, in connection with the Freitas Lease scheme, there was evidence that Corrente again contacted Dunham prior to finalization of the lease and influenced him to drop consideration of an alternative lease.

glean from taped conversations and the trial testimony of David Ead – a co-conspirator and vice-chair of the Board of Tax Assessment Review – that there existed an organized structure with Cianci at the top, Corrente as a middle man facilitating and often initiating transactions, and others, including Autiello, Ead, and Pannone, that fed deals into the organization (or in Ead's case, sometimes tried to replace Corrente as the middle man). The defendants attempted to use, to varying degrees of success, various municipal agencies in committing a series of related bribes and extortions. These agencies were used in this manner on an ongoing basis from 1991 through 1999. The fact that other persons and entities were used in some transactions but not in others does not matter; the jury instructions reflected this flexibility.[4]

There was detailed evidence, moreover, placing Cianci, the City's mayor, in the middle of at least four of the enumerated racketeering acts. With regard to the Ronci Estate scheme, David Ead testified at trial that he suggested to Ronci's attorney that the estate settle its tax claim with the City for $100,000 in exchange for a $10,000

---

[4] The court instructed, in relevant part:

> "An enterprise may exist even though individual members come and go as long as it continues in an essentially unchanged form during substantially the entire period alleged in the indictment,. . . ."
>
> "It is not necessary in proving the existence of an enterprise to show that each member of the enterprise participated in or even knew of all of its activities,. . . ."

" . . . a Defendant need not have been associated with an enterprise for the entire time that the enterprise existed in order to have been associated with the enterprise, but a Defendant must share some common goal or objective of the enterprise in order to be a member."

contribution to the Friends of Cianci. Ead met with Cianci and discussed the proposed deal. The settlement was approved by the City's Board of Tax Assessment Review. Ead testified that shortly thereafter, he was contacted by Corrente, who told him that Cianci wanted Corrente to collect the money. Ead responded that he was waiting for the Ronci attorney, to which Corrente replied, "Well you know that the Mayor he's on my back – do your best." After receiving the money from Ronci's attorney, Ead brought the money to Corrente who put his finger on his lips and took the envelope. A tape-recorded conversation between Joseph Pannone and Anthony Freitas provided additional evidence.[5] Our dissenting brother recognizes that there was enough evidence for the jury to conclude that defendants functionally controlled the Board of Tax Assessment Review, often for criminal purposes.

With regard to the Ise Job, Ead again testified that he served as a middleman for Mayor Cianci, this time arranging a $5,000 bribe in exchange for a municipal job. According to Ead, Cianci asked during their conversation about Ise, cautious about whether "he's alright" and looking for assurances that "he's not going to say nothing." Upon learning that the City's Department of Planning and Development had no positions available, Cianci ordered the Department to "make one." Upon receiving the $5,000 "contribution," Cianci told Ead, "Don't get nervous."

In their trial testimony, which closely tracked taped conversations among Freitas, Pannone, and other City

---

[5] Pannone said to Freitas, "Ead took care of the Mayor, don't know what he gave the Mayor . . . He took care of me, too. He pushed the Ronci settlement through."

officials, both Freitas and Ead implicated Cianci in the Freitas Lots scheme, in which Cianci pressured the Providence Redevelopment Authority, the entity empowered to sell the lots, to expedite the sale of two City-owned lots to Freitas in exchange for a $10,000 "contribution" by Freitas to the Cianci political fund. Finally, with regard to the Tow List scheme, Dorothy Deveraux – Corrente's assistant and the Friends' bookkeeper – wrote a note to Corrente which implicated all three defendants in that scheme.[6] Moreover, as Judge Howard concedes, the jury could have found, based primarily on taped statements and the trial testimony of towing association chairman Kenneth Rocha, that Corrente effectively controlled who made it onto the police department's tow list.

We recognize that the defendants did not always get their way with municipal departments and employees.[7]

---

[6] Deveraux's note supported the prosecution theory that when towers occasionally "contributed" too much money under the same name, the defendants arranged for "replacement" checks to be made by third-party straw contributors. The note read, "FRANK – attached are two over checks – Please sign and Dick Autiello will be by today to replace with new checks – I need your help with the other people – these overages total $3,420.00. I know the Mayor does not want to part with that – without money being replaced. Please assign someone to talk to these people."

[7] For example, in connection with the Freitas Lots scheme, Cianci was displeased that elements within the Providence Redevelopment Agency did not sufficiently accede to his wishes, specifically when the PRA sold one of the "Freitas lots" before Cianci had a chance to finalize a deal with Freitas. In connection with the University Club scheme, Cianci was displeased when members of the Providence Building Board of Review ignored his wishes and granted the club some of the variances that it sought. Finally, in connection with the Maggiacomo Job scheme, the Chief of Police declined to admit Maggiacomo to the police academy because he had a criminal history and had been untruthful during a screening interview.

But the fact that some racketeering schemes did not go as planned, and that certain elements within the City may not have completely complied with the defendants' wishes, does not defeat the integrity of the charged enterprise. The jury could have concluded that these glitches in the schemes only meant that certain substantive crimes went uncompleted and that otherwise, defendants possessed and exercised considerable control over crucial elements of the City. The evidence amply establishes a close relationship between defendants and the City in which they exercised their leadership roles. The enterprise and the conspiracy still thrived and the defendants were able to complete other schemes through their abuse of the municipal apparatus.

Defendants attempt to expose what they deem an error by the government in charging an overly broad enterprise that places a criminal onus on a largely innocent City. They warn that an enterprise such as that charged here implicates non-culpable municipal parties in associations which they had little or no idea were engaged in illicit activities. But this fear is misplaced. Here, as long as elements within the City, such as the police chief and members of the Building Review Board and Redevelopment Agencies, in fact did not actively share in the defendants' illegal purposes, we see no reason why we run into now-Justice Breyer's admonition in *Ryan*: that of failing to differentiate between associations that fall within the sweep of RICO and associations involving only the exploitation of others by criminals. *See* 901 F.2d at 180-81 (emphasizing the need to limit "the potentially boundless scope of the word 'enterprise' so as to distinguish culpable from non-culpable associations," and recognizing "the serious consequences for any man or woman, state official

or private person, who is publicly accused of racketeering"); *see also Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226-28 (7th Cir. 1997).[8] Justice Breyer's limiting principle of a shared common purpose among members of an association-in-fact enterprise still functions here to prevent a "boundless enterprise." Those employees of a city that do not exhibit the requisite mens rea with regard to the enterprise's illicit purposes will not be criminally or civilly implicated. In the present litigation, the City was named a member of the charged enterprise, not a defendant. The City "shared" in the enterprise's purpose only to the extent of the defendants' considerable influence and control over the relevant municipal agencies, and to the extent of those officials and departments who were wittingly or unwittingly involved in the various schemes. Being named in the enterprise does not make the City itself criminally or civilly liable under RICO.[9] It bears repeating that the RICO statute defines "enterprise" broadly and that the Supreme Court has consistently instructed that we read

---

[8] We distinguish Judge Howard's law firm hypothetical on the same basis by which defendants' criminal purpose is imputed to the City: that defendants, as City officials and leaders, had effective titular and actual control over these municipal agencies. The same presumably cannot be said for the hypothetical Providence law firm.

[9] The definitions of an enterprise in the RICO statute and the jury instructions in no way require an enterprise to include nothing but criminal actors. To the contrary, a legitimate business, exploited by racketeers, may be an enterprise. It is true that members of an association-in-fact enterprise, such as is now charged, must be connected by a common thread of purpose; and one might often expect such a purpose to be of a criminal nature. *See Turkette*, 452 U.S. at 578. But the ultimate question is whether an association-in-fact exists. For this, it is not required that each participant have a separate mens rea so long as each can reasonably be said to share in the common purpose. The City's role here in the overall plans of the defendants suffices for it be part of the association-in-fact enterprise.

the overall statute expansively. *See Turkette*, 452 U.S. at 586-87; *Sedina* [sic], *S.P.R.L.*, 473 U.S. at 497-98. A liberal construal of the RICO statute and in particular, the term "enterprise," leads us to the conclusion that the enterprise, as charged, is supported by the evidence.

C. Pattern of racketeering activity

Defendants also argue that there was insufficient evidence of a pattern of racketeering activity. For purposes of a RICO conspiracy, the sufficiency questions boils down to whether a jury could have found that the defendants intended to further an endeavor which, if completed, would have satisfied the "pattern" requirement of RICO. *See Salinas v. United States*, 522 U.S. 52, 61-66, 139 L. Ed. 2d 352, 118 S. Ct. 469 (1997); *United States v. Edwards*, 303 F.3d 606, 642 (5th Cir. 2002). Here, the evidence shows that the endeavor resulted in a series of completed crimes. Evidence of all nine schemes enumerated in the indictment, including the two that underlie Corrente's substantive RICO conviction, shows a pattern of racketeering activity.

Two or more RICO predicate acts form a "pattern" if they are (1) "related" and (2) "amount to or pose a threat of continued criminal activity." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989); *Systems Mgmt., Inc. v. Loiselle*, 303 F.3d 100, 105 (1st Cir. 2002).

Predicate acts are "related" for RICO purposes if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J., Inc.*, 492 U.S. at 240 (quotation

marks omitted). We must bear in mind that "a criminal enterprise is more, not less, dangerous if it is versatile, flexible, diverse in its objectives and capabilities. Versatility, flexibility, and diversity are not inconsistent with pattern." *Masters*, 924 F.2d at 1367.

The evidence shows that the defendants, and ultimately Cianci, were the beneficiaries of most if not all of the nine schemes. The jury could have concluded that the schemes were designed to line Cianci's pockets as well as to maintain his political power in the City. As for methods, most of the schemes involved either Cianci or Corrente calling or personally meeting with city officials and influencing municipal decision-making either through explicit or implicit orders. As the government points out, important "sub-trends" underlay the schemes. The Jere Realty Lease and the Freitas Lease dealt with the School Department. The Tow List and Maggiacomo Job involved the Police Department. The Ise and Maggiocomo [sic] Jobs both involved pawning of municipal jobs. Both the Ronci Estate and Freitas Lots schemes involved extortions for tax abatements. All of the offenses involve trading jobs, contracts, and official acts for money, contributions to Cianci's political fund, or other items of value. In most of the schemes, the money was solicited by, paid to, or collected by Corrente.

In addition, the schemes often shared the same players. Corrente, Ead, Pannone, and Autiello were all fundraisers for the Friends of Cianci. Ead participated in the Ronci Estate, the Ise Job, and the Freitas Lots schemes, while Pannone played important roles in the Ronci Estate, the Freitas Lease, and Pay-to-Get-Paid schemes. Autiello was the chief associate in the Tow List extortion and Maggiacomo Job sale. Overall, the evidence

shows that the individual racketeering acts were not isolated events but rather parts of a pattern of racketeering activity contemplated and committed by an overarching RICO conspiracy to which all three defendants, along with other co-conspirators, belonged.

"Continuity" of the pattern of racketeering may be shown by either "a series of related predicates extending over a substantial period of time," or a pattern of more limited duration where "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future" or "the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *H.J., Inc.*, 492 U.S. at 242.

Defendants were accused of conducting a RICO conspiracy that lasted nine years. The Tow List scheme spanned approximately the entire period. During this time, Autiello regularly channeled contributions to Corrente. When towers contributed too much money under the same name, the conspirators scrambled to find other straw contributors, or "replacement" contributors.

The Jere Realty and Freitas Lots schemes both involved kickbacks to the defendants in exchange for pressure on the City to grant leases. As the district court concluded, "[I]t was reasonable for the jury to infer that additional payments would be made in order to renew the lease[s]." The Pay-to-Get-Paid scheme presented the same danger: "The City's habitual tardiness in paying its vendors, and the period of time over which Freitas made payments to expedite payment of his invoices, provided ample justification for the jury to conclude that such payments would continue to be made in the future."

Evidence concerning the Ise and Maggiocomo [sic] Jobs, both transpiring in 1996, was enough for the jury to conclude that these bribes were part of the same, continuous pattern that jobs in the City could be had for a price. The Freitas Lots, Freitas Lease, and Freitas Invoices schemes revolved around deals with Anthony Freitas, whose testimony revealed an especially active stage of the conspiracy in 1998 and 1999.

There is no need to go into more detail. The evidence speaks more than enough to the conclusion that the jury could have found the requisite "pattern of racketeering activity" here.

D. Conspiracy

Based on the same evidence, the jury could have found a conspiracy involving all three defendants. We reiterate that RICO conspiracy does not require proof that a defendant "himself committed or agreed to commit the two predicate acts requisite for a substantive RICO offense under § 1962(c)." *Salinas*, 522 U.S. at 61-66. Rather, he "must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." *Id.* at 65. We have noted that "the conspiratorial agreement need not be express so long as its existence can plausibly be inferred from the defendants' words and actions and the interdependence of activities and persons involved." *United States v. Boylan*, 898 F.2d 230, 241-42 (1st Cir. 1990). The evidence, detailed above and throughout this opinion, amply fills this requirement.

As for Cianci, Ead's testimony placed Cianci at the head of the Ronci Estate, Ise Job, and Freitas Lots schemes. Taped remarks by Corrente implicated Cianci in the Freitas Lease. Corrente's position as Cianci's Director of Administration is itself circumstantial evidence of Cianci's conspiratorial involvement.

Corrente was implicated in at least five of the nine racketeering schemes. He initiated the Tow List scheme and played a major part in maintaining it throughout the duration of the conspiracy. Corrente received cash payments as part of the Jere Realty, Ronci Estate, Freitas Lease, and Pay-to-Get-Paid schemes.

Testimony by Kenneth Rocha, the chairman of the towers' association, revealed that Autiello was the point person for towers when it came time to make contributions to Cianci's political fund. Autiello took in the payments and reminded towers when their payments were due. As for Autiello's part in the Maggiocomo [sic] Job scheme, Mary Maggiacomo testified that she asked Autiello, who was in charge of maintenance of police cruisers, to help her son obtain a job on the City force. She delivered the $5,000 payment to him. When her son was ultimately denied admission into the police, Autiello refused to return the payment to Mrs. Maggiacomo.

E. Special verdict

At the government's request, the district court submitted to the jury a special verdict form. Under the substantive RICO count (Count Two), the verdict form contained special interrogatories for each of the RICO predicates, listing them separately for each defendant. For each of the RICO predicates, the form asked the jury to

check off "yes" or "no" to indicate whether the government had proven the predicate with respect to each defendant. As to Cianci, the jury returned the verdict form with "no" checked for every box (except one) indicating the government had not proven those racketeering acts. The one unchecked box was for Act Ten (University Club); we offer no opinion on why the jury decided to leave it blank. For Corrente, the jury checked off "no" for all racketeering acts except Act Eight (Freitas Lease) and Act 9(a) ("Pay-to-Get-Paid"), for which the jury checked off "yes." For Autiello, the jury checked off "no" for all racketeering acts except Act Twelve (Maggiacomo job), which the jury concluded the government had proven. Ultimately, only Corrente was convicted on Count Two, substantive RICO, and all three defendants were found guilty on Count One, RICO conspiracy.

Defendants argue that the jury's responses to the interrogatories in the special verdict form under Count Two (the substantive RICO count) should bear on the verdict as to Count One (the RICO conspiracy). They claim that the jury's negative responses to these interrogatories indicate their rejection of the evidence proffered by the government for each of those offenses to which the jury responded "no." Defendants further contend that given the jury's specific findings, the evidence is insufficient to support the conspiracy verdict as a matter of law. They postulate that the specific purpose of the special verdict form is to limit the facts found at trial for the purpose of assessing on appeal the sufficiency of the prevailing party's case. Ordinarily, when a jury returns a general verdict of guilty on a substantive RICO count and one of the predicate acts is later found to be legally insufficient by a reviewing court, the conviction must be overturned

where it is impossible to determine whether two legally sufficient predicate acts support a RICO conviction. *See United States v. Holzer*, 840 F.2d 1343, 1352 (7th Cir. 1988); *United States v. Kragness*, 830 F.2d 842, 861 (8th Cir. 1987).

The special verdict form allows juries to specifically identify the predicates for the general verdict. In *United States v. Torres Lopez*, 851 F.2d 520 (1st Cir. 1988), we reversed a substantive RICO conviction where the jury's responses to interrogatories on a special verdict form properly related to the substantive conviction revealed that the government proved only time-barred predicates. The defendants in that case argued that as indicated by the special verdict, the jury found them guilty of only two predicates. When both of those predicates were shown to be outside the statute of limitations, we overturned the substantive RICO conviction. Other circuits have employed the special verdict form similarly. *See United States v. Edwards*, 303 F.3d 606 (5th Cir. 2002) (court used special verdict to uphold RICO conviction as being based on two valid predicates); *United States v. Kramer*, 73 F.3d 1067 (11th Cir. 1996) (money laundering conviction cannot stand where special verdict established defendant involvement in only foreign transactions).

The government counters that defendants' argument fails under the doctrine articulated by the Supreme Court in *Dunn v. United States*, 284 U.S. 390, 76 L. Ed. 356, 52 S. Ct. 189 (1932) and *United States v. Powell*, 469 U.S. 57, 83 L. Ed. 2d 461, 105 S. Ct. 471 (1984). In both cases, the Court held that acquittals on certain counts of an indictment play no role in the analysis of whether there is sufficient evidence supporting the surviving counts. *Powell*, 469 U.S. at 64-69; *Dunn*, 284 U.S. at 392-94; *see*

*also United States v. Alicea*, 205 F.3d 480 (1st Cir. 2000). The reasoning is that a jury's decision to acquit on a particular count or counts may well be the product of "mistake, compromise, and lenity" and "a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts."[10] *Powell*, 469 U.S. at 65-67. The Court was concerned with the impracticality of a rule that would allow defendants to challenge inconsistent verdicts where such a challenge was speculative or would require inquiries into the jury's deliberations. *See id.* at 68.

The defendants claim that neither *Powell* nor *Dunn* undermines the purpose and viability of special verdict forms in defining the universe of resolved facts. They assert that in this case, we should exempt from our sufficiency review those pieces of evidence that have "been conclusively contradicted[.]" *Chongris v. Bd. of Appeals*, 811 F.2d 36, 37 (1st Cir. 1987). In reviewing a criminal conviction for sufficiency, we do not assess the credibility of the witnesses, "which is the sole function of the trier of fact." *Burks v. United States*, 437 U.S. 1, 16, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978); *Torres Lopez*, 851 F.2d at 527.

We have been steadfast with *Powell* and have repeatedly refused to carve out exceptions to the rule. *United States v. Bucuvalas*, 909 F.2d 593, 595-97 (1st Cir. 1990) (adhering to *Powell* rule in affirming bribery conspiracy conviction of defendant, where jury acquitted all of the

[10] This rationale applies more directly to defendants' other argument that the jury's acquittals on the substantive, non-RICO counts should influence our review of the sufficiency of the evidence on the RICO conspiracy count.

charged conspirators except defendant); *Alicea*, 205 F.3d at 484 ("In a single, multi-count trial, acquittal on one or more counts does not preclude conviction on other counts based upon the same evidence, as long as that evidence is legally sufficient to support a finding of guilt on the count(s) of conviction."); *see also United States v. Richard*, 234 F.3d 763, 768 (1st Cir. 2000); *United States v. Hernandez*, 146 F.3d 30, 33 (1st Cir. 1998); *United States v. Crochiere*, 129 F.3d 233, 239 (1st Cir. 1997).

We are similarly hard pressed to make an exception here. The RICO conspiracy count and substantive RICO count are separate. The list of racketeering acts to which the jury answered interrogatories is part of the substantive RICO count only. The government requested the form so that if the jury did convict on substantive RICO, the conviction would be buttressed by express jury findings as to the two-predicate requirement. The jury appears to have understood the two-predicate requirement, in that it checked off two predicates (extortion conspiracies for the Freitas Lease and "Pay-to-Get-Paid" schemes) for Corrente, who was the only defendant convicted on the substantive RICO count. No predicates were checked off for Cianci, and only one (bribery conspiracy in connection with the Maggiacomo Job) was found proven for Autiello; hence, neither was convicted of substantive RICO.

The "separate-ness" of the counts in the indictment, however, is not the central point of contention in this issue. *Powell*, 469 U.S. at 64. Defendants concede that "a person may be convicted of RICO conspiracy and acquitted of all substantive acts." (emphasis added). If proof of the requisite criminal agreement exists, "whether or not the substantive crime ensues" is irrelevant. *Salinas*, 522 U.S. at 65. Hence, the jury did not go out-of-bounds by convicting on

the RICO conspiracy count while concluding the government failed to prove certain predicate racketeering acts underlying the substantive RICO count. *See United States v. Weiner*, 3 F.3d 17, 22 (1st Cir. 1993) ("Despite the dismissal of the separate [substantive] counts, the jury was entitled to consider the evidence [underlying those substantive counts] in support of the RICO counts").

Most instructive is *United States v. Connolly*, 341 F.3d 16 (1st Cir. 2003), where we upheld a substantive RICO and RICO conspiracy conviction. The defendant contended that the government's failure to prove an "enterprise" was evidenced by the jury's finding that nine of fourteen racketeering acts listed in the indictment had not been proven beyond a reasonable doubt. Specifically, the defendant argued that the evidence did not establish that the charged enterprise was "continuous" or "ongoing." We stated that

> simply because the jury found a specified racketeering act as "unproven beyond a reasonable doubt" does not mean that the jury found the evidence relating to that act unpersuasive, in combination with other evidence in the case, on the existence of an association-in-fact enterprise. Rather, it may only mean that the government did not prove a requisite element of the underlying crime alleged as a racketeering act. . . . In returning a finding of "unproven," the jury could have concluded that the evidence underlying a [particular racketeering act], while failing to [prove all the elements of the crime committed by the act], nevertheless demonstrated a corrupt gratuity evidencing the existence of an illegal enterprise.

*Id.* at 26-27. The evidence relating to those acts that were found "unproven" by the jury was still available to the jury

in its evaluation of the overall RICO charge. "That being so, the inquiry on appeal is whether the jury, in light of the totality of the evidence, was presented with sufficient evidence of "continuity" to support a conviction." *Id.* at 27. The jury verdict may be a compromise reflecting evil preparations by all three defendants but some doubt about implementation by Cianci and Autiello. In other words, though the evidence might not have shown completed commission of the racketeering acts, it could have led the jury to find the requisites of a RICO conspiracy among the defendants to commit the racketeering acts.

F. Amendment and variance

Defendants claim that the district court was only able to deny their dismissal motions by constructively amending the indictment. They point to the court's statement, in denying these motions, that "it seems to the Court that the indictment alleges that what the Defendants are accused of doing is having conducted the affairs of the City through a pattern of racketeering activity." Defendants also claim that post-trial the district court erroneously concluded that the indictment could have alleged that the City was an innocent, unwitting participant in the criminal enterprise. This, defendants contend, conflicts with how they understood the indictment – that the City was a culpable participant in the RICO enterprise – and hence constituted a constructive amendment of the indictment.

An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or the court after the grand jury has returned the indictment. *United States v. Dubon-Otero*, 292 F.3d 1 (1st Cir. 2002). Amending the

indictment is considered prejudicial *per se* and thus demands reversal. *Id.* at 4. The government argues that regardless of the alleged disparity between the indictment and the trial judge's characterization thereof, there was no constructive amendment where the court instructed the jury "on the theory as charged." Indeed, the court specifically instructed, without objection from either party, that "the Government must prove that the Defendants knowingly and willfully joined the conspiracy with knowledge of its unlawful purpose and with the intent that the purpose would be accomplished."

We find defendants' claimed understanding of the illicit-purpose RICO enterprise charged in the indictment to be both inaccurate and disingenuous. The indictment does not compel a reading that the City itself (or its constituent agencies) had to be found criminally culpable, as we explain in more detail *supra*. Defendants allude to *United States v. Weissman*, 899 F.2d 1111, 1115 (11th Cir. 1990), where the Eleventh Circuit held that the district court's jury charge "in effect altered an essential element of the crime charged" in the indictment. Here, the charge was taken largely from the indictment. No intimations by the court recast the "essential" elements of RICO outlined in the indictment. At no point, pre-trial or post-trial, did the district court transform the charged association-in-fact enterprise into a legal-purpose or legal-entity enterprise. The court's descriptions of the enterprise were in accord with the breadth of the enterprise charged in the indictment and the breadth the Supreme Court has assigned to RICO overall.

Alternatively, defendants contend that disparities between the indictment and the evidence resulted in a prejudicial variance. "A variance arises when the proof at

trial depicts a scenario that differs materially from the scenario limned in the indictment." *United States v. Villarman-Oviedo*, 325 F.3d 1, 12 (1st Cir. 2003) (internal quotation marks omitted). A variance requires reversal only when it is "both material and prejudicial, for example, if the variance works a substantial interference with the defendant's right to be informed of the charges laid at his doorstep." *Id.* (internal quotations marks omitted).

First, we reiterate that the jury's acquittals on the substantive counts and negative decisions on the racketeering acts listed under Count Two do not make the evidence underlying those counts and acts irrelevant to the RICO conspiracy count. Second, we repeat that the evidence as a whole, viewed in the light most favorable to the verdict, is sufficient as to the RICO conspiracy convictions for all three defendants. Accordingly, defendants' reliance on *United States v. Morales*, 185 F.3d 74 (2d Cir. 1999) (reversing RICO convictions where evidence established that defendants had all been incarcerated early in the period of racketeering activity alleged in the indictment), is misplaced. The evidence at trial, covering acts that occurred from 1991 to 1999 as charged in the indictment, tracked and satisfied the RICO elements and factual allegations contained in the indictment.

G. "Associate" Liability

Autiello, and Corrente by adoption, argues that the court's instructions on "associate" liability under RICO failed to comply with the standard set out by the Supreme Court in *Reves v. Ernst & Young*, 507 U.S. 170, 122 L. Ed. 2d 525, 113 S. Ct. 1163 (1993). The Court in *Reves* created the "operation management" test for determining

RICO "associate" liability. In order to have taken part in, or associated with the conduct of an enterprise, an "associate" must have had some part in directing those affairs of the enterprise. *Id.* at 177-78. The Court also stated that "an enterprise is operated not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management." *Id.* at 184. The Court further elucidated:

> Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required. The "operation or management" test expresses this requirement in a formulation that is easy to apply.

*Id.* at 179.

Autiello and Corrente argue that the district court "watered down" the government's burden of proof in its jury instruction on "associate" RICO liability.[11] Specifically,

---

[11] The court instructed, in relevant part:

> "I told you that the Government has to prove that a Defendant is employed by or associated with an enterprise. A person is considered to be associated with an enterprise if he or she knowingly participates directly or indirectly in the conduct of the enterprise's affairs or business.
>
> A person doesn't have to have a formal relationship with or an official position in an enterprise in order to be associated with that enterprise.
>
> Association may include an informal relationship or agreement between a person and an enterprise. A person also may be associated with an enterprise even though his

(Continued on following page)

they claim that the instructions permitted conviction for performing acts without control over some part of the "direction" of the enterprise.

We find no merit in defendants' objection. The instructions did not misstate the law; in fact, they reflected *Reves* nearly verbatim. Defendants argue that the buzz word on "associate" liability is that an associate "direct" or be "integral" to the affairs of the enterprise. The crucial words, however, are "operation and management," which effectively communicate to a jury that in order for a defendant to have been an associate of the RICO enterprise, his participation needs to have had "an element of direction" of the enterprise's affairs. *Id.* at 178; *United States v. Marino*, 277 F.3d 11, 33 (1st Cir.), *cert. denied*, 536 U.S. 948, 153 L. Ed. 2d 819, 122 S. Ct. 2639 (2002); *United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994). The court more than sufficiently accounted for this requirement by instructing

---

or her role is a relatively minor role, just as the case with respect to conspiracy.

. . . In order to establish that Defendant conducted or participated directly or indirectly in the conduct of an enterprise's affairs, the Government must prove that the Defendant played some part in the operation or management of the enterprise.

Conducting or participating in the conduct of an enterprise's affairs includes things like performing acts, function or duties which are related to the operation of the enterprise. The Government doesn't have to prove that a Defendant exercised significant control over or within the enterprise, and the Government doesn't have to prove that the Defendant was an upper echelon member of the enterprise.

An enterprise is operated not only upper management but also by lower rung participants who work under the direction of the managers of the enterprise."

that the defendant must have "played some part in the operation or management of the enterprise."

In general, we have fashioned the *Reves* "operation or management" test in accordance with the breadth with which we must construe RICO:

> The requirement of association with the enterprise is not strict. The RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise. The RICO statute seeks to encompass people who are merely associated with the enterprise. The defendant need only be aware of at least the general existence of the enterprise named in the indictment, and know about its related activities.

*Marino*, 277 F.3d at 33 (citations and internal quotations omitted). Hence, as an evidentiary matter, the government presented more than enough to establish that, if there was an enterprise, the two, at various times, played important roles in the direction and supervision of the enterprise's operations. Neither was merely "peripherally involved with the enterprise." The direct testimony of Kenneth Rocha demonstrated that not only was Autiello aware of the general existence of the enterprise, but that he was central to furthering the goals of the enterprise, specifically as the collection agent for Corrente in obtaining payments from the Tow List members. His participation in the Maggiacomo Job scheme again evinced his awareness of the general enterprise as well as his direct involvement in the direction and management of the enterprise. As for Corrente, we need not rehash the evidence that amply establishes his role in the enterprise. The fact that he was Cianci's right-hand man, in addition to evidence specifically showing his directorial or supervisory involvement in

individual racketeering acts, puts him in the heartland of "associate" RICO liability as set out in *Reves*.

## II. The Joint Federal Bribery Conspiracy Convictions (Corrente and Autiello)

In relevant part, the federal bribery statute provides:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists –
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof-
>
> * * *
>
> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government or agency involving any thing of value of $5000 or more . . .
>
> * * *
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 U.S.C. § 666(a)(1)(B). Corrente and Autiello were convicted of conspiring to violate this statute, *see* 18 U.S.C.

§ 371, for their roles in the Tow List scheme. The government's theory was that, in requiring "campaign contributions" from those who wished to remain on the police department's tow list, Corrente (in cahoots with Autiello, who acted as the towers' agent) acted as an "agent" of the police department within the meaning of subsection (a)(1). The department qualified as an "agency" under subsection (b) because it received an average of about $1 million in federal aid annually (and never less than $10,000) between 1991 and 1999. A portion of that aid (conferred in connection with a federal anti-domestic violence program) was used in and around 1996(1) to train dispatchers for the police unit that, among their other duties, called companies on the City's tow list when towing was needed, and (2) to purchase the communications and computer equipment used by the dispatchers who made these calls.

Corrente and Autiello argue that their convictions cannot stand because there is insufficient evidence of a connection between their conduct and the federal funds received by the police department. The district court instructed the jury, without objection, that such a connection is required. The court described the connection (in relevant part) as follows: "The Government must . . . prove that there is some connection between the alleged bribe and the federal funds received by the local government or agency. . . ." Corrente and Autiello contend that the "federal funds" evidence described in the preceding paragraph is patently inadequate to ground a finding that such a connection existed in this case.

The two concede that the statute itself does not require that the offense conduct have an effect on the federal funds. *See Salinas*, 522 U.S. at 61 ("As a matter of

statutory construction, § 666(a)(1)(B) does not require the Government to prove the bribe in question had any particular influence on federal funds. . . .") (emphasis supplied). They also acknowledge that, at the time of oral argument, a post-*Salinas* circuit split had emerged over whether, as a statutory and/or constitutional matter, some connection between the offense conduct and a federal interest (if not federal funds themselves) was required. *Compare, e.g., United States v. Zwick*, 199 F.3d 672, 682-88 (3d Cir. 1999) (treating the statute as having been enacted under the Spending Clause and holding, in part because the Constitution requires that "legislation regulating behavior of entities receiving federal funds must . . . be based upon a federal interest in the particular conduct," (*citing South Dakota v. Dole*, 483 U.S. 203, 207, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987)), that the statute requires the government to prove that a federal interest is implicated by the offense conduct), and *United States v. Santopietro*, 166 F.3d 88, 92-93 (2d Cir. 1999) (similar, endorsing the post-*Salinas* vitality of prior Second Circuit law interpreting the statute to require that the offense conduct threaten the integrity and proper operation of a federal program), with, *e.g., United States v. Sabri*, 326 F.3d 937, 940-53 (8th Cir. 2003) (no connection between the offense conduct and a case-specific federal interest is required by either the Constitution or the statute, which was lawfully enacted under the Necessary and Proper Clause and not the Spending Clause).

Unsurprisingly, Corrente and Autiello prefer the approach exemplified by *Zwick* and *Santopietro*. They emphasize that *Salinas* explicitly left open whether some connection between the offense conduct and a federal interest is required for the statute to be constitutionally

applied. *See* 522 U.S. at 60-61 (declining to decide the broader constitutional issue because the statute was constitutionally applied on the case facts). They argue that requiring a connection such as the one identified in *Zwick* and *Santopietro* is necessary to maintain an appropriate state-federal balance in a criminal law area that has been the traditional province of the states.

While these appeals were under advisement, the Supreme Court granted a writ of certiorari in *Sabri* and resolved the circuit split in favor of the position adopted by the Eighth Circuit. *See Sabri v. United States,* 541 U.S. 600, 158 L. Ed. 2d 891, 124 S. Ct. 1941, 1945-49 (2004). If error can be "plain" within the meaning of Fed. R. Crim. P. 52(b) even if it only becomes so while the case in which it is raised is on appeal, *see Johnson v. United States,* 520 U.S. 461, 467-68, 137 L. Ed. 2d 718, 117 S. Ct. 1544 (1997), we see no reason why it should not also be "patent" for purposes of applying the *Zanghi* principle, *see* 189 F.3d at 79-80, discussed and applied *supra* at 18-19. Because application of *Zanghi* requires that we disregard the nexus instruction upon which Corrente and Autiello base their sufficiency challenges to their joint federal bribery conspiracy convictions, we must reject those challenges.

## III. The Remaining Convictions

### A. Federal Bribery Conspiracy (Autiello)

Autiello argues that there was insufficient evidence to support his conviction for federal bribery conspiracy in connection with the Maggiacomo Job scheme. Autiello contends that, because there was no direct evidence about either the identity of his co-conspirator or the fate of the $5,000 Mary Maggiacomo paid him, the evidence gave

nearly equal circumstantial support to an inference that he pocketed the money as a payment for his efforts with the police department (with which he had influence) on behalf of Joseph Maggiacomo as it did to an inference that he passed the bribe along to some public official, or at least conspired to do so. *See United States v. Andujar*, 49 F.3d 16, 20 (1st Cir. 1995) ("If the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilty and a theory of innocence of the crime charged, this court must reverse the conviction.") (citation and internal quotation marks omitted). The argument is unconvincing.

There was evidence that, during a face-to-face meeting in which his favorable intercessions were sought, Autiello told Mary Maggiacomo and her husband that Providence police officer positions were prized and that Joseph Maggiacomo's chances were not good because the Maggiacomos were not Providence taxpayers and had not made any "contributions." In nearly the same breath, Autiello told them that, if they wanted Joseph to be accepted into the police academy, they would have to come up with $5,000 in cash. The juxtaposition of these two comments, combined with the evidence that Autiello himself held no authority to make police academy admission decisions, permitted a reasonable inference that the $5,000 was to be a political "contribution" that would serve as Joseph's ticket of admission when passed along to someone with authority over academy admission decisions.

B. Hobbs Act Attempted Extortion and Extortion Conspiracy (Corrente)

Corrente makes three arguments in favor of reversing or vacating his convictions for Hobbs Act attempted

extortion and Hobbs Act extortion conspiracy in connection with the Freitas Lease and Freitas Invoices schemes: (1) there was insufficient evidence that these schemes had the constitutionally required impact on interstate commerce; (2) there was insufficient evidence that he affirmatively acted in such a way as to be fairly accused of having attempted or conspired to engage in extortion; and (3) the district court's jury instructions erroneously described what was required to establish an attempt or conspiracy to engage in extortion. There is some question whether each of these arguments was made below as to each of the three convictions, but we bypass issues of forfeiture because none of the arguments is persuasive on its merits.

Corrente's first argument is largely based on an assertion that his convictions are unconstitutional because his offense conduct had to, but did not, have more than a *de minimis* effect on interstate commerce in order to jibe with the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), and *United States v. Morrison*, 529 U.S. 598, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000). After briefs were filed in this case, another panel of the court rejected this argument, *United States v. Capozzi*, 347 F.3d 327, 334-336 (1st Cir. 2003), so we must reject it too, *see, e.g., United States v. Downs-Moses*, 329 F.3d 253, 263 (1st Cir. 2003).

Corrente alternatively argues that no reasonable factfinder could have found that his offense conduct had such a *de minimis* effect. He is wrong.

With respect to Corrente's attempted extortion in connection with the Freitas Lease scheme, the jury could have found that, but for Freitas' agreement to pay Corrente for favorable intervention on his behalf with the

school department, there was a realistic probability that the City contractor (an entity engaged in interstate commerce and whose lease agreement would be a transaction affecting interstate commerce[12]) would have leased space in Cranston, Rhode Island. This evidence alone satisfies constitutional concerns, even if the space for which Corrente advocated actually proved to be a better fit for the contractor. *See Capozzi,* 347 F.3d at 335 (extortionate conduct need only create a realistic probability of an effect on interstate commerce) (citations omitted); *id.* at 337 (conviction for attempted extortion requires only a showing that the identified effect would have occurred had the defendant succeeded in the extortion); *United States v. Tormos-Vega,* 959 F.2d 1103, 1113 (1st Cir. 1992) (extortionate conduct meets constitutional requirements even where it "has a beneficial effect on interstate commerce") (citation and internal quotation marks omitted); *id.* (where the victim's acquiescence in an extortion results in a transaction with effects on interstate commerce, constitutional concerns are satisfied).

With respect to the Freitas Invoices scheme, the jury could have found that a city contractor that was indisputably engaged in interstate commerce was deprived of $1,100 in order to facilitate payments to which it was entitled. This was enough. *See Capozzi,* 347 F.3d at 337 ("One common method for the government to establish the required '*de minimis* effect' on interstate commerce is to show that the defendant's activity "minimally depletes the

[12] The contractor, the Marriott Corporation, supplied lunches and custodial services to all Providence schools. There was evidence that the company was incorporated in New York and had offices in Washington, D.C., and Newark, Delaware.

assets of an entity doing business in interstate commerce.") (*quoting United States v. Nguyen*, 246 F.3d 52, 54 (1st Cir. 2001)).

Corrente's other two arguments are very difficult to follow. In the main, they appear to be interrelated attacks on the correctness of *Evans v. United States*, 504 U.S. 255, 119 L. Ed. 2d 57, 112 S. Ct. 1881 (1992). *Evans* interpreted the provision of the Hobbs Act under which Corrente was convicted – one which prohibits extortion by means of "the obtaining of property from another, with his consent, . . . under color of official right," 18 U.S.C. § 1951(b)(2) – not to require that the government prove that the defendant initiated the extortionate transaction or otherwise induced the payments. Rather, "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.* at 268. Corrente appears to believe that the *Evans* Court erred in concluding that the defendant need not induce the payment or otherwise initiate the event. *See* Corrente Br. at 49. To the extent that he is so arguing, Corrente acknowledges that we are powerless to grant him relief and that he must go to the Supreme Court. *Id.*

There are hints of other arguments in Corrente's brief, but none is sufficiently developed to warrant consideration on the merits. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). In any event, our review of the record convinces us that there is no basis for reversing or vacating Corrente's attempted extortion and extortion conspiracy convictions.

Any sufficiency challenge is doomed because there was sufficient evidence to support the convictions even

under the more demanding interpretation of the Hobbs Act for which Corrente advocates. With respect to the Freitas Lease scheme, the jury could have found that Corrente "induced" payments from Freitas when, at one point prior to receiving any money related to this scheme, he suggested to Freitas that City Hall could either hurt or help his chances of securing the lease (depending, presumably, on whether Freitas anted up). With respect to the Freitas Invoices scheme, the jury could have found that Pannone, Corrente's co-conspirator, induced payments on Corrente's behalf by encouraging Freitas to "throw something" at Corrente – i.e., to "pay to get paid."

So too with the jury instructions. As clarified in a supplemental charge just prior to the return of the verdicts, the instructions on the attempted extortion and extortion conspiracy charges were, if anything, overly generous to Corrente. And because the evidence was sufficient to support the convictions even under the arguably too lenient instructions, any error was harmless. *See* Fed. R. Crim. P. 52(a); *United States v. Royal*, 100 F.3d 1019, 1027 (1st Cir. 1996).

## IV. Admission of the Pannone Tapes

Defendants contend that the district court violated various Rules of Evidence and their confrontation and due process rights in admitting into evidence certain tape-recorded conversations among Freitas (who was acting as a government agent), Pannone, the Chairman of the Board of Tax Assessment Review and an alleged co-conspirator, and various other individuals, some identified and others not. They also argue that the court erred in precluding them from interposing objections to the admission of these

tape recordings for their failure to abide by a procedural order requiring that Rule 403 and 404(b) objections be identified with specificity in advance of trial.

A. *Petrozziello* determination

Defendants argue that the district court erred when it concluded that Pannone's statements fell outside of the hearsay rule under Fed. R. Evid. 801(d)(2)(E).[13] We review this determination for clear error. *United States v. Geronimo*, 330 F.3d 67, 74 (1st Cir. 2003); *Marino*, 277 F.3d at 25. In determining whether the Government has met Rule 801(d)(2)(E) prerequisites, the district court must determine that it is "more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy." *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977). We refer to this determination as a "*Petrozziello* ruling." *Geronimo*, 330 F.3d at 75.

Defendants contend that there was "scanty" evidence of a conspiracy among defendants and Pannone. They argue that Pannone's taped statements were unreliable and there was insufficient extrinsic evidence of the conspiracies because some of the conversations on the tape were "rambling and unfocused" and not all of the defendants were ultimately convicted as part of the three racketeering acts – the Ronci Estate, Freitas Lease, and

[13] "A statement is not hearsay if . . . the statement is offered against the party[-opponent] and is . . . a statement by a coconspirator [sic] of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E).

Freitas Invoices schemes – of which Pannone had first-hand knowledge.

We disagree. As we have detailed *supra*, the government presented sufficient evidence of a RICO conspiracy – conspiracy, enterprise, and pattern of racketeering activity – to satisfy the evidentiary standard set forth in *Petrozziello*. In particular, on tape, Corrente intimated to Freitas with respect to the Freitas Lease scheme, "Don't get involved with Joe unless something happens." Corrente also admits on tape to receiving cash from Pannone in connection with the Pay-to-Get-Paid scheme. Pannone chaired the Board of Tax Assessment Review, a municipal office which we have already detailed to be crucial to the conspiracy. Both Freitas and Ead testified at trial to Pannone's involvement in the Ronci Estate, Freitas Lease, and Pay-to-Get Paid schemes. With regard to the Ronci Estate scheme, the evidence showed a sub-conspiracy among Cianci, Corrente, and Pannone to extort money from the Ronci estate in exchange for a reduction of back taxes owed to the City and the assessment of property owned by the estate. At the times the taped statements were made, the evidence also shows a conspiracy between at least Corrente and Pannone to extort money from Tony Freitas and JKL Engineering in exchange for assistance in leasing property owned by Freitas to the City or to the Marriott Corporation. Third, the evidence was sufficient to establish a conspiracy between at least Corrente and Pannone to extort money from Freitas and JKL in exchange for facilitating payments due from the City to JKL.

Pannone's taped statements were not made "after the fact," but were uttered as part of and in furtherance of the conspiracy. In these statements, Pannone described the roles that he, Cianci, Corrente, and Ead played in the

conspiracy and in particular, what he and Freitas should do to carry out the Freitas Lease and Pay-to-Get-Paid schemes. Such statements are well within the core of Rule 801(d)(2)(E). *See United States v. Martinez-Medina,* 279 F.3d 105, 117 (1st Cir.), *cert. denied,* 537 U.S. 921, 154 L. Ed. 2d 210, 123 S. Ct. 311 (2002); *United States v. Eke,* 117 F.3d 19, 21 (1st Cir. 1997). The district court did not commit clear error in admitting the Pannone tapes and we decline to reverse defendants' convictions on *Petrozziello* grounds.

B. Confrontation Clause and Due Process claims

Defendants contend that Pannone's taped statements are inherently unreliable and hence should not have been admitted in evidence. As a constitutional matter, they claim that the statements' unreliability implicates Sixth Amendment witness confrontation concerns. This Court reviews Confrontation Clause challenges *de novo. United States v. Ventura-Melendez,* 275 F.3d 9, 15 (1st Cir. 2001). The Confrontation Clause does not require "a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying co-conspirator, when those statements otherwise satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E)." *United States v. Inadi,* 475 U.S. 387, 391, 89 L. Ed. 2d 390, 106 S. Ct. 1121 (1986). It also "does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E)." *Bourjaily v. United States,* 483 U.S. 171, 183-84, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987).

Defendants argue that notwithstanding *Inadi* and *Bourjaily,* Pannone's statements should not have been

admitted because he was unavailable and unreliable. They assert that the present case is anomalous and that "corruption stings" such as this one should not fall within *Inadi* and *Bourjaily*. We find no case law excepting the case from the *Inadi* and *Bourjaily* rules. Defendants further suggest that Pannone was outside of his "natural habitat" because Freitas was eliciting incriminating statements from him as part of his cooperation with the FBI. Pannone, however, was unaware that he was being stung. We see no reason how his behavior would have been different had Freitas been making the same conversation without the FBI's direction.

To further address defendants' contention that Pannone's statements are inherently unreliable, we agree with the district court that Pannone "did have or was in a position to have firsthand knowledge of some of the things that he testified about." He was an insider to the conspiracy. Again, he was directly involved and even played a supervisory role in the Ronci Estate, Freitas Lease, and Freitas Invoices schemes. Trial testimony by Ead, Rocha, Freitas, and others corroborated Pannone's taped statements setting out how Corrente was often the middleman in the racket, that Cianci used Corrente as a buffer, and that money given to Corrente found its way into the campaign and eventually benefitted Cianci or the administration in some way. Taped conversations between Freitas and Corrente confirmed the same.

The government questions Cianci and Corrente's motive for failing to call Pannone as a witness for cross-examination as Fed. R. Evid. 806 permits. Cianci and Corrente repeatedly contend that Pannone was unavailable to them because he would assert his Fifth Amendment rights against self-incrimination if called to testify.

They claim that Pannone's behavior was "orchestrated" by the Government in their plea arrangements with him.

This alleged "attempt to thwart cross-examination" forms the basis of defendants' Fifth Amendment due process claim. The procedural travel of the case, however, reveals little to support this accusation. The indictment in this case originally named Pannone as a defendant on Counts 1, 2, 8, 9, 16-19, and 21-24. On February 14, 2002, he signed a plea agreement in which he agreed to plead guilty to Counts 1, 2, 8, 16, 19, and 22. The government agreed to dismiss the remaining counts at sentencing. Hence, dismissal of the remaining charges against Pannone was contingent upon sentencing.

On April 16, 2002, during a hearing to resolve defendants' motion to exclude the Pannone tapes, Corrente complained that Pannone's plea agreement had "left open" the remaining counts, suggesting that Pannone's fear of the government's handling of the remaining counts would cause him to assert his Fifth Amendment rights if he were called by the defense to testify. The court, though ultimately rejecting defendants' legal arguments, assured them that it would try to accelerate Pannone's sentencing, which at that time had been scheduled for July.

Thereafter, the district court moved up Pannone's sentencing in order to accommodate defendants in this case. Pannone was sentenced on May 24, 2002, while the government was still presenting its case-in-chief and almost two weeks before the defense presented their own case. Immediately after sentencing, the government moved to dismiss the remaining counts against Pannone; the court granted the motion. During a bench conference four days after Pannone's sentencing, Corrente's counsel

briefly remarked that he had been informed by Pannone's counsel that Pannone would persist in his Fifth Amendment claim "because of a variety of reasons which I won't go into right now." Nothing more was made of these "reasons."

After this point, defendants did not attempt to call Pannone as a witness. We find no evidence that Pannone would have invoked his Fifth Amendment right against self-incrimination if called to testify, and whether the court would have permitted him to do so. There simply is no evidence of an "orchestration" by the government to keep Pannone away from defendants. Thus, there were no constitutional infringements here.[14]

C. Rules 403 and 404(b)

Finally, with respect to the Pannone tapes, defendants argue that the district court erred by failing to consider their objections to admission of the tapes under Fed. R. Evid. 403[15] and 404(b).[16] They claim that they made timely

---

[14] To the extent that defendants' due process claim incorporates their argument that Pannone's statements are unreliable, our affirmance of the district court's *Petrozziello* ruling sufficiently responds to that claim.

[15] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

[16] "Other Crimes, Wrongs, or Acts – Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in

(Continued on following page)

objections pre-trial. They further recount that the court decided not to address the objections prior to trial, but then mistakenly at trial ruled that defendants waived their right to object to admission of the tapes.

We first recount the procedural history giving rise to this issue. On April 24, 2001, the government provided defendants with copies of the two hundred tapes relating to their investigation of defendants, along with an index showing the dates of the recordings and the conversation participants. Three days later, the court issued an Arraignment and Pre-trial Discovery Order, whereby the government was ordered to provide the defendants with transcripts of the tapes. The court also ordered that all pre-trial motions be filed by December 31, 2001.

The government eliminated all but twenty-two tapes as possible trial exhibits. By October 31, 2001 – two months before the deadline for pre-trial motions and six months before the commencement of trial – the government had provided transcripts of these twenty-two tapes to defendants.

On March 28, 2002, the district court issued a Pre-trial Scheduling Order, which read:

> On or before April 12, 2002, counsel for any party disputing the audibility or admissibility of any such recording or the accuracy of any such transcript shall file an objection identifying the recording to which objection is being made.

---

a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Fed. R. Evid. 404(b).

> Memoranda in support of objections to the accuracy or completeness of transcripts shall be accompanied by copies of the transcripts objected to on which proposed deletions and corrections are noted.
>
> In offering recorded conversations, counsel shall make every effort to edit out footage that contains no audible discussion or contains irrelevant material so that the jury will not be required to listen for protracted periods of time to portions of recordings that provide little or no assistance in determining the pertinent facts. In order to achieve that objective, counsel shall meet and confer, in advance, in an effort to resolve any disputes with respect to editing.
>
> . . . Failure to comply with the provisions of this paragraph may be considered as a waiver, by the proponent, of the right to offer the recorded conversation(s) at issue; or, alternatively, as a waiver of the right to object to omission of the recorded conversation(s) and/or dispute the accuracy or completeness of the transcript, as the case may be.

On April 8, 2002, defendants filed a motion objecting to the admission of the Pannone tapes. They based their motion primarily on *Petrozziello* and constitutional grounds, and mentioned Rules 403 and 404 in a general observation that "any given statement may also be inadmissible" under those rules. They did not identify which statements were inadmissible, but instead suggested that the court itself should "go through" the tapes "line-by-line, making individual assessments as to each declarative statement." Defendants stated that they would provide the court with a schedule identifying offending statements and

detailing the bases for their exclusion. They never provided this schedule.

At the April 16 hearing on the motion, defendants again focused on *Petrozziello* and the constitutional theories. Corrente's counsel acknowledged that the government had edited the tapes to deal with Rule 403 concerns. Nothing more was said with regard to either 403 or 404. The court denied the motion to suppress the Pannone statements and refused to undertake the line-by-line analysis, explaining that it "would take easily, . . . weeks . . . and it would delay the trial by that period of time." The court expressed its plan to "minimize the risk of a mistrial in the event that statements are presented that later are found not satisfy the requirements" by requiring the government to present "additional evidence above and beyond the statements themselves to support a finding that they qualify as admissible co-conspirator statements."

On April 24, the second day of trial, the government in-chambers mentioned that defendants had failed to propose cuts to the Pannone tapes. In response to Corrente's counsel's suggestion that the defense would later in the trial move to excise other taped statements pursuant to Rules 403 and 404, the court stated that such motions "should have been done long ago."

Throughout trial, the court repeated that proposals for cuts to the tapes had been due by April 12, 2002, pursuant to its Pre-trial Scheduling Order. Upon challenges at trial by defendants to the admissibility of individual tapes, the court stated that they could not make these objections because they had failed to tender such an objection pre-trial.

Defendants argue that they complied with the pre-trial scheduling order because they timely filed "an objection identifying the recording to which objection is being made" as required by the Pre-trial Scheduling Order. However, they fail to mention that the order also mandates that "[m]emoranda in support of objections . . . shall be accompanied by copies of the transcripts objected to on which proposed deletions and corrections are noted." Defendants failed to provide the district court with these specific objections. The supplemental schedule promised by defendants never materialized; the schedule, moreover, was not an "extra" offer, but explicitly required by the order as part of any objection to the tapes. The district court declined to perform a line-by-line assessment of the transcripts because it had specifically provided in the order that the parties do it. After repeated general objections non-compliant with the procedural order, the court decided that the defendants waived their right to object pursuant to the order. It did not abuse its discretion in refusing to entertain piecemeal objections to evidence in the Pannone tapes.

Regardless, admission of the taped statements – which defendants still have failed to itemize – did not prejudice defendants. As we have explained *supra*, the government has produced sufficient evidence of the tapes' reliability and probative value. Moreover, the court followed through on its assurance that it would "minimize the risk" of improper admission by requiring the government to produce evidence corroborative of statements made in the tapes.

We stress that the court wisely recognized that stop-and-go evidentiary evaluations of these tapes during trial would unduly delay the case and perhaps even cause the

very prejudice and confusion that defendants contemplated in their general objection. Accordingly, the court fashioned a system well before trial through which it expected both parties to whittle down the tapes to their relevant portions. *See United States v. Nelson-Rodriguez*, 319 F.3d 12, 34 (1st Cir. 2003) ("The trial court has wide discretion in determining admissibility under Rule 403 since the trial judge 'is more directly familiar than a court of appeals with the need for the evidence and its likely effect.'") (citations omitted). An important part of this system was for defendants to produce transcripts of the tapes denoting which portions they wished to redact out of Rule 403, Rule 404, constitutional, or *Petrozziello* concerns. Even in their appeal, defendants persist in the ambiguity of their objection to the tapes. Other circuits have not tolerated this type of objection. *See, e.g., United States v. Holland*, 880 F.2d 1091, 1094-95 (9th Cir. 1989) (where some parts of audiotape were admissible but "much of the tape was irrelevant," the defendant's "blanket objection to the admission of the tape does not preserve an objection to failure to redact the tape"). We find no abuse in the district court's exercise of its broad discretion over Rule 403 and 404 considerations.

## V. Cianci's Taped Statement

### A. Hearsay

In 1995, a government agent posing as an air conditioning businessman taped his conversation with Cianci when he requested a city contract. Cianci assured the agent that he would refer him to Alan Sepe, who Cianci believed knew more about air conditioning matters than he did. Cianci then told the agent, "[Sepe] is honest as the day is long. He deals in governments and ___. No one will

ask you for a thing. If anybody does, you pick up the phone and call me. I'll cut his ___ off and have him arrested, okay?" The agent had said or done nothing to prompt discussion of corruption. Then, Cianci, in introducing the agent to an unidentified man, remarked, "He's probably an FBI agent."

The district court refused to admit this tape on relevancy grounds, holding that the conversation in it "does not relate to any predicate act or to any specific matter with respect to which the Government has presented any evidence." In response to Cianci's argument that the statements were admissible under the "state of mind" exception to the hearsay rule, *see* Fed. R. Evid. 803(3), the court concluded, "This statement or the import of the statement is to show what Mr. Cianci did or didn't do on other occasions with respect to unrelated matters, so therefore it does not fall under the exception to the hearsay rule created by Rule 803(3) for state of mind existing at the time of the event in question." Cianci argues that the district court's refusal to admit this taped statement in evidence was an abuse of discretion and violated his right to due process. *Colasanto v. Life Ins. Co. of North America*, 100 F.3d 203, 213 (1st Cir. 1996).

The district court deemed Cianci's taped statement irrelevant because it did "not relate to any predicate act or to any specific matter with respect to which the Government has presented any evidence." Cianci argues that the court failed to recognize the statement's relevance to the RICO charges in general. He asserts that the statement tends to make the existence of the enterprise less likely than without the statement, Fed. R. Evid. 401, and that the court "conflated the provisions of Rule 803(3) . . . with the relevancy requirements of Rule 401."

Cianci recapitulates that if the statement in the tape is hearsay, it falls within the state of mind exception to the hearsay rule. Fed. R. Evid. 803(3). "To be admissible under this exception, a declaration, among other things, must 'mirror a state of mind, which, in light of all the circumstances, including proximity in time, is reasonably likely to have been the same condition existing at the material time.'" *Colasanto,* 100 F.3d at 212 (*quoting* 2 John W. Strong, McCormick on Evidence § 274 (4th ed. 1992)). Cianci contends that the statement evinces a contemporaneous intent not to endorse bribery in his administration, rather than a statement denying past instances of corrupt acts. In addition to adopting the district court's conclusion that the statement evinced a "state of mind" as to events or behavior on other occasions, the government argues that Cianci's statements were self-serving, and hence outside the ambit of Rule 803(3), because he knew that he was talking to a federal agent.

As an initial matter, the taped statement is hearsay. Cianci offered it to prove the truth of the assertion that Cianci did not tolerate corruption. Another thing is certain: the statement was not admissible in order to show what Cianci might have done or not done on other occasions not proximate to the time the statement was uttered. The only purpose for which the statement could have been admitted would have been to establish Cianci's state of mind at the time the statement was made. Because "disputes over whether particular statements come within the state-of-mind exception are fact-sensitive, the trial court is in the best position to resolve them." *Colasanto,* 100 F.3d at 212. That the statement was made at one point during the time of charged conspiracy cannot be sufficient to mandate its admission, especially where the latter part

of the statement – "He's probably an FBI agent" – places doubt on what Cianci claims is the probative value and relevance of the statement as a whole. Whether Cianci's statement is "forward-looking" or refers to past acts and events is unclear from the statement itself. This issue is further complicated by the fact that Cianci's mention of pay-offs was "gratuitous" and not provoked by anything the agent said or did. Hence, it was within the district court's discretion to conclude that the statement, at least in part, applied to past acts of the Cianci administration and were to a large extent "self-serving" attempts to cover tracks already made. Such observations are well-established grounds for non-admission. *See, e.g., United States v. Bishop,* 264 F.3d 535, 549 (5th Cir. 2001), *cert. denied,* 535 U.S. 1016, 152 L. Ed. 2d 620, 122 S. Ct. 1605 (2002); *United States v. Miller,* 874 F.2d 1255, 1265-66 (9th Cir. 1989); *United States v. Jackson,* 780 F.2d 1305, 1313-15 (7th Cir. 1986). Thus, as the district court determined that Cianci sought to admit the statement "to show that he did not and does not take bribes or engage in corrupt activity," we are loath to disturb the court's exercise of discretion to deny admission of the statement.

B. Due Process claim

Cianci claims that by denying admission of his taped statement, the district court violated his Fifth Amendment due process right to "a meaningful opportunity to present a complete defense." *Crane v. Kentucky,* 476 U.S. 683, 687, 90 L. Ed. 2d 636, 106 S. Ct. 2142 (1986). We review this claim for plain error because it was not raised at trial. Under plain error review, the defendant must show (1) that an error occurred (2) which was "obvious" in the sense that governing law was clearly settled to the contrary, (3)

affected the defendant's substantial rights, and (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings. *United States v. Gomez,* 255 F.3d 31, 37 (1st Cir. 2001).

Application of evidentiary rules "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' . . . We have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *United States v. Scheffer,* 523 U.S. 303, 308, 140 L. Ed. 2d 413, 118 S. Ct. 1261 (1998) (*citing Rock v. Arkansas,* 483 U.S. 44, 56, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987)). We have described the Supreme Court's rule as overturning convictions only in "egregious cases." *Fortini v. Murphy,* 257 F.3d 39, 47 (1st Cir. 2001). Cianci outlines his "weighty interest" as his effort to disprove the government's theory of criminal intent. Even if we were to give some exculpatory value to the statement, given the amount of evidence of Cianci's criminal knowledge and intent presented at trial, its absence from the evidence does not rise to an "egregious" violation of Cianci's interest in defeating this part of the government's case. Arguably, the statement itself indicates that Cianci knew he was talking to an FBI agent. Regardless, the court acted well within its discretion in determining that Cianci's taped statement did not pass muster under Rule 401 and that its value, if any, fell outside of Rule 803(3)'s exception to the hearsay rule. Accordingly, we conclude that the court's refusal to admit his taped statement did not constitute error, let alone plain error, and thus, Cianci's due process claim fails.

## VI. Conclusion

Accordingly, defendants' convictions are affirmed.

## VII. Sentencing and Forfeiture Appeals

In light of the Supreme Court's recent decision in *Blakely v. Washington*, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (June 24, 2004), we do not decide the sentencing appeals raised by all defendants as well as challenges by defendants and the government to the district court's forfeiture order. By separate order, we have requested additional briefing and oral argument on these issues.

**Separate opinion, concurring in part and dissenting in part, follows.**

---

**CONCUR BY:** HOWARD (In Part)

**DISSENT BY:** HOWARD (In Part)

**DISSENT:**

**HOWARD, Circuit Judge, concurring in part and dissenting in part.** The majority has skillfully analyzed a number of very difficult issues, and I concur in parts II and III of its opinion, which affirm Corrente's and Autiello's non-RICO-related convictions. As to the RICO-related convictions, I am not persuaded that the majority correctly disregards the jury's interrogatory answers in conducting its sufficiency review, *see ante* part I-E, or that it has convincingly fended off defendants' argument that a municipal entity, which is incapable of being found to have acted with an unlawful purpose, cannot coherently be regarded as a member of an associated-in-fact RICO

enterprise that is defined by the shared unlawful purposes of its associates, *see ante* part I-B. But even if I assume that the jury's interrogatory answers are irrelevant and that municipal entities can be named as associates of the type of RICO enterprise that was alleged in this case, I still must dissent from the majority's conclusion that there is sufficient record evidence to sustain defendants' RICO-related convictions. In my view, the RICO-related judgments (including the forfeiture judgment) should be reversed and this matter should be remanded for resentencing.

The majority has done an excellent job of summarizing the relevant legal principles, the nature of the associated-in-fact RICO enterprise alleged in this case, and the pattern of racketeering activity underlying the RICO and RICO conspiracy allegations. *See ante* at 4-10 & 11-13. I adopt this discussion by reference and turn to the particulars of the argument I find persuasive.

Defendants contest their RICO-related convictions, in part, on the ground that the evidence introduced at trial in support of the nine alleged schemes was inadequate to establish that the schemes were conducted through the amalgam of persons and entities alleged in the indictment to have constituted the RICO enterprise. Defendants premise this argument on an underlying assertion that there was no proof to ground an inference of a shared purpose among defendants and all of the municipal entities named as associates of the enterprise – a required finding (at least usually, *see ante* at 13) if an unlawful criminal association is to be regarded as a RICO enterprise. Defendants say that their position is bolstered by two "findings" made by the district court and not contradicted by the government (or at least not clearly so): (1)

"there is no evidence that the [City] departments and/or agencies, themselves, shared [the enterprise's] purposes," *United States v. Cianci,* 210 F. Supp. 2d 71, 73 (D.R.I. 2002), and (2) "none of [defendants'] acts . . . resulted in any significant disruption of a Governmental function." Thus, the argument goes, even if we were to assess the adequacy of the evidence supporting the RICO convictions by looking at the whole record and construing it in favor of the government (despite the nine judgments of acquittal entered by the district court and the special interrogatory answers collectively indicating that much of the government's RICO case was not "proven"), we would find only a few, relatively inconsequential interactions between the defendants and these municipal entities during the nearly eight years the enterprise was alleged to have existed.

The government's response tracks the grounds on which the district court rejected the defendants' motions for judgments of acquittal: (1) we should follow the Ninth Circuit and hold that "RICO does not require intentional or 'purposeful' behavior by corporations charged as members of an association-in-fact," *United States v. Feldman,* 853 F.2d 648, 657 (9th Cir. 1988); and (2) the jury's enterprise finding was sufficiently supported by evidence that Cianci and Corrente (Autiello, who was not a municipal employee, is not mentioned) "using the Office of the Mayor and the Office of Director of Administration as base camps, . . . controlled" the municipal entities named as enterprise associates. The government's first suggestion, that we reject defendants' argument on the basis of the *Feldman* principle, faces insurmountable obstacles. This court has identified the "common purpose" requirement discussed in *United States v. Turkette,* 452 U.S. 576, 580-83, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981), as one of the principal tools

a factfinder should use to distinguish a RICO enterprise from an *ad hoc* criminal confederation. *See ante* at 13; *see also Ryan v. Clemente,* 901 F.2d 177, 180 (1st Cir. 1990) (emphasizing that the common purpose requirement is necessary to "limit the potentially boundless scope of the word 'enterprise'" and thereby "distinguish culpable, from non-culpable, associations").[1] Indeed, we have applied the requirement (albeit without acknowledging *Feldman*) in a case involving an unlawful purpose RICO association-in-fact involving corporate legal entities. *See United States v. London,* 66 F.3d 1227, 1243-45 (1st Cir. 1995). Moreover, and decisively, the district court instructed the jury without objection from the government: "It is not necessary in proving the existence of an enterprise to show that each member of the enterprise participated in or even knew of all of its activities, but it is necessary to show that all members of the alleged enterprise shared a common purpose." The government has not attempted to reconcile *Feldman* with *Turkette, Ryan, London,* or our other cases applying *Turkette. See ante* at 13. Thus, as the majority concedes, we cannot disregard the common-purpose instruction in analyzing defendants' sufficiency challenges. *See ante* at 18-19 (*citing United States v. Zanghi,* 189 F.3d 71, 79-80 (1st Cir. 1999)). The question whether *Feldman* correctly states the law must be left to another day.[2]

---

[1] *Ryan,* which was authored by then-Judge Breyer, involved a civil RICO claim, but precedent generated in civil RICO cases applies to criminal RICO cases. *See United States v. Shifman,* 124 F.3d 31, 35 n.1 (1st Cir. 1997).

[2] Even under the *Feldman* approach, the court still would face the question whether entities not controlled by those accused of operating the alleged association-in-fact enterprise are properly considered part of such an enterprise. For the reasons that follow, I do not think that they

(Continued on following page)

This leaves the government's undeveloped assertion – an assertion that the majority finds convincing – that the jury's enterprise finding is sustainable because there was evidence that Cianci and Corrente exercised "control" over the municipal entities named as members of the enterprise. Because the common-purpose instruction binds for purposes of our analysis, I shall assume that the government intends by this assertion to argue that such "control" is sufficient to impute to the entities the unlawful purposes of those alleged to control them – i.e., Cianci and Corrente. *Compare London*, 66 F.3d at 1243-45 (involving closely held corporations operated by the defendant and alleged to be members of his unlawful associated-in-fact RICO enterprise); *United States v. Masters*, 924 F.2d 1362, 1366-67 (7th Cir. 1991) (involving a law firm and two police departments associated in fact with those who controlled or manipulated them). I also shall assume that it would be fair to sustain the defendants' convictions on evidence of such control, notwithstanding the absence of jury instructions explaining that a municipal entity's "purposes" may be so ascertained. Even so, I do not see how the convictions can stand.

In my view, there is no proof that Cianci and Corrente so controlled the activities of all the municipal entities alleged to be associates of the charged enterprise that the two's shared criminal purposes are reasonably imputed to each such entity. There is no evidence that, for example, Cianci and Corrente themselves could provide those willing to pay bribes with jobs in City departments over which they lacked hiring authority; or that they could

---

are. Thus, my conclusion that the *Feldman* rule does not apply under the facts of this case is not outcome determinative.

contractually bind City departments under separate leadership; or that they could sell City property; or that they could grant or deny construction variances. Nor did the government show that the persons, committees, and boards within the municipal departments, offices, and agencies whose assistance the schemes required abdicated their decision-making responsibilities to Cianci or Corrente.[3] In short, neither Cianci nor Corrente was shown to have so dominated the affairs of the departments, offices, and agencies claimed to be associated with the unlawful purpose enterprise that each of these municipal entities might fairly be found to have been an alter ego of Cianci or Corrente with respect to the transactions in question.[4]

---

[3] This statement is subject to the following two qualifications. First, the jury could have found that Corrente himself had the ability to dictate which towers were placed on the police department's tow list. Second, the jury could have found that the Board of Tax Assessment Review was effectively controlled by Cianci and Corrente through the corrupt machinations of RICO co-conspirators Joseph Pannone (BTAR's Chairman) and David Ead (BTAR's Vice-Chairman).

[4] By this statement, I do not mean to imply that those municipal actors to whom Cianci and Corrente directed their successful requests and demands (*compare infra* note 5) always acted within standard operating procedures or even lawfully. To the contrary, as the majority explains it:

> The evidence depicted a behavioral spectrum ranging from innocent cooperation to willful complicity in unlawful conduct. For example, with respect to the Freitas Invoices scheme, the evidence was merely that an employee within the City's Finance Department (Lorraine Lisi), acting at Corrente's request, paid valid invoices more promptly than usual. Similarly, with respect to the Ise Job scheme, the evidence was merely that the Deputy Director of the Department of Planning and Development (Thomas Deller) created a temporary position for Ise within the department at Cianci's request. At the more culpable end of the spectrum, however, there was evidence that, in connection with the Jere Lease scheme, the head of the Department of

(Continued on following page)

Rather, the evidence showed only that Cianci and Corrente periodically used the power inherent in their positions to influence (or attempt to influence)[5] the decisions of

---

Public Property (Alan Sepe) and the Director of Business Relations for the School Department (Mark Dunham) were influenced by Corrente to tailor the specifications in a School Department lease bid to fit the dimensions of Jere Realty's building, and then to support the Jere Realty lease before the Board of Contract and Supply (which was the entity formally empowered to accept or reject bids of City contracts). Similarly, in connection with the Freitas Lease scheme, there was evidence that Corrente again contacted Dunham prior to finalization of the lease and influenced him to drop consideration of an alternative lease.

*Ante* at 20 n.3. But importantly, even in connection with these latter two schemes, Sepe and Dunham were not shown to have known of and willingly joined the alleged RICO enterprise conspiracy. Nor was there a basis for finding that a majority of the Board of Contract and Supply, the entity which ultimately voted to accept the Jere Realty lease, did so for purposes of furthering the alleged RICO enterprise conspiracy, or even with knowledge that it was ratifying a contract that had been formed in disregard of standard operating procedures.

[5] The majority acknowledges that Cianci and Corrente "did not always get their way. . . ." *Ante* at 24. As the majority notes, there was uncontradicted evidence that, in connection with the Freitas Lots scheme, Cianci was displeased that elements within the Providence Redevelopment Agency, the entity empowered to sell the lots, did not sufficiently accede to his wishes. *See id.* n.7. There also was uncontradicted evidence that, in connection with the University Club scheme, Cianci was angered when members of the Providence Building Board of Review ignored his wishes and granted the club some of the variances that it sought. *See id.* Finally, there was uncontradicted evidence that, in connection with the Maggiacomo Job scheme, the Chief of Police declined to admit Maggiacomo to the police academy because he had a criminal history and had been untruthful during a screening interview. *See id.*

The majority suggests that this evidence "does not defeat the integrity of the charged enterprise" because the jury could have concluded that "these glitches in the schemes only meant that certain substantive crimes went uncompleted. . . ." *Id.* With respect, I think that the evidence is more telling on the point in question – whether

(Continued on following page)

other municipal actors – actors who, with the exceptions noted in the preceding footnote, were not shown to be privy to, let alone supportive of, the alleged enterprise's purposes.

The question arises why this evidence of influence is not sufficient to make the persons and entities influenced part of the alleged enterprise. The answer, I believe, lies in the fact that we are here deciding what is required for membership in an associated-in-fact RICO enterprise defined only by the common unlawful purposes of its members. This is a highly ramified decision with implications, criminal and civil, that extend far beyond this case. Were we to permit a person or entity to be named part of an unlawful purpose enterprise on mere evidence that the person or entity acceded to a mobster's request (but without knowledge of the purposes underlying the request), we would be heading down the slippery slope against which then-Judge Breyer warned in *Ryan*: that of failing to differentiate between associations that fall within the sweep of RICO and associations involving only the exploitation of others by criminals. *See* 901 F.2d at 180-81 (emphasizing the need to limit "the potentially boundless scope of the word 'enterprise' so as to distinguish culpable from non-culpable associations," and recognizing "the serious consequences for any man or woman, state official or private person, who is publicly

---

there was sufficient evidence that Cianci and Corrente so controlled the Providence Redevelopment Agency, the Providence Building Board of Review, and the Department of Public Safety that their unlawful purposes should be imputed to these entities – than the majority acknowledges. There was, after all (and as the majority concedes, *see ante* at 17), no other evidence from which the jury might have found that defendants controlled these agencies (or at least relevantly so).

accused of racketeering"); *see also Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226-28 (7th Cir. 1997).[6] As *Ryan* suggests, membership in an unlawful purpose RICO enterprise implies potential culpability under the RICO statute. *See* 901 F.2d at 181; *see also* 18 U.S.C. § 1962(d) (allowing for the imposition of RICO liability under conspiracy principles). Thus, as a matter of logic (not to mention due process), one who lacks the mental state necessary for the imposition of RICO liability because he is unaware of the enterprise or its purposes also lacks the mental state necessary to be part of a RICO enterprise that is defined solely by the shared, culpable mental state of its members. This is ultimately what, in my view, dooms the government's enterprise allegations in this case.

There was in this case significant evidence of public corruption. Perhaps the government could have proved that Cianci and Corrente ran the Office of the Mayor or the Office of the Director of Administration as a RICO enterprise. Or perhaps the defendants (or, more likely, a subset thereof) might have been shown to be members of one or more smaller, associated-in-fact RICO enterprises. But the government successfully persuaded the grand jury

[6] To illustrate, suppose there was evidence that a young law school graduate made a $5,000 "campaign contribution" to Cianci and asked for a recommendation to the hiring partner of a Providence law firm that does a substantial amount of city business. Suppose further that there was evidence that Cianci called the firm's hiring partner and asked that the firm give serious consideration to hiring the young lawyer. If the firm did so, would it become a member of the common purpose enterprise alleged in this case? If the answer is "no" (as I think it clearly should be), on what principled basis can we find that the Department of Planning and Development – the agency that created a temporary position for Christopher Ise at the request of Cianci – was proved to be part of the enterprise?

to cast a wider net and to allege that the persons named as enterprise associates, along with the campaign contribution fund, the City of Providence, and many of its departments, offices and agencies, functioned as a *de facto* organized crime syndicate. Framing the case in this way permitted the government to allege that defendants were responsible under RICO's conspiracy provision for all of the illegal and unethical conduct put on display in this trial – even that in which they were not shown to have personally participated.[7] But this broad case theory obligated the government to prove that each municipal entity alleged to have engaged in conduct that constituted part of the "pattern of racketeering activity" identified in the indictment was itself a member of the enterprise. As another court has put it:

> It must be stressed that the government, through its ability to craft indictments, is the master of the scope of the charged RICO conspiracy. . . . [RICO's conspiracy provision] is capable of providing for the linkage in one proceeding of a number of otherwise distinct crimes and/or conspiracies through the concept of enterprise conspiracy. The government, through the vehicle of the indictment, provides the linking conspiratorial objective of a specific RICO violation. The "specific" violation can be broad or narrow. It is the prosecution which sets the parameters to which a RICO conspiracy trial must be confined;

---

[7] For example, Autiello was responsible under RICO for the unlawful conduct underlying the Freitas Lease and Freitas Invoice schemes – schemes on which the jury returned substantive convictions but in which he was not involved – on the theory that he was a member of a conspiracy to conduct the enterprise that carried out these schemes.

> having set the stage, the government must be satisfied with the limits of its own creation.

*United States v. Weissman*, 899 F.2d 1111, 1115 (11th Cir. 1990) (*quoting United States v. Neapolitan*, 791 F.2d 489, 501 (7th Cir. 1986)) (internal quotation marks omitted; emphasis in original).

RICO is a powerful weapon that can cause mischief if abused by an overzealous prosecutor.[*] While I do not doubt that RICO will sometimes apply in cases of political corruption, I fear the consequences of making the statute too easy to invoke – or too easy to apply broadly – in the political context, where persons who have made a contribution to a politician routinely receive favorable treatment from offices or agencies over which the politician has influence. I therefore agree with Justice Breyer that we must place comprehensible limits on RICO's reach and that an important way of cabining the statute is to require true culpability before one may be named part of an associated-in-fact RICO enterprise defined by the common unlawful purposes of its constituents. *See Ryan*, 901 F.2d at 180-81. Such a limitation helps to ensure that cases involving claims of political corruption will not also inevitably give rise to a RICO charge, and that cases involving multiple acts of common law fraud will not also inevitably give rise to civil liability under the statute.

In this case, the government proved only that many of the municipal entities named in the indictment were used

---

[*] I am speaking generally here and in no way intend to impugn those who brought this case. Indeed, there is no reason to doubt that the government's enterprise allegations were made in a good faith attempt to comply with circuit precedent in this tricky area of the law.

as tools by defendants. For reasons I have explained, this is not enough to prove that these entities were part of a RICO enterprise defined only by the shared unlawful goals of its members. Thus, the government failed to prove the existence of the enterprise alleged in connection with the RICO counts, and the RICO convictions cannot stand. *See United States v. Morales*, 185 F.3d 74, 80-82 (2d Cir. 1999) (reversing on sufficiency grounds where the proof failed as to the specific enterprise charged in the indictment); *Weissman*, 899 F.2d at 1113-15 (vacating a conviction obtained after the trial court constructively amended the indictment in a supplemental jury instruction by permitting the jury to find a different enterprise than that charged in the indictment).

I respectfully dissent from part I of the majority opinion and would not reach the issues addressed in parts IV-VI (which are rendered immaterial by my conclusion that the defendants' RICO-related convictions must be reversed).

## APPENDIX B

**United States Court of Appeals**
**For the First Circuit**

---

No. 02-2158
No. 02-2165
No. 02-2288

UNITED STATES,

Appellee,

v.

VINCENT A. CIANCI, JR.,

Defendant, Appellant,

---

No. 02-2159

UNITED STATES,

Appellee,

v.

FRANK E. CORRENTE,

Defendant, Appellant,

---

No. 02-2166

UNITED STATES,

Appellee,

v.

RICHARD E. AUTIELLO,

Defendant, Appellant

---

Before
Boudin, *Chief Judge*,
Campbell*, *Senor Circuit Judge*,
Torruella, Selya, *Circuit Judges*,
Stahl*, *Senior Circuit Judge*,
Lynch, Lipez and Howard, *Circuit Judges*.

---

ORDER OF COURT

Entered: October 8, 2004

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be *denied*.

By the Court:

RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk.

[cc: John MacFadyen, Esq., Anthony Traini, Esq., Donald Lockhart, AUSA Richard Rose, AUSA, Margaret E. Curran, AUSA, Michael Iannotti, AUSA, Terrence Donnelly, AUSA, Craig Moore, USA, C. Leonard O'Brien, Esq., Richard Bicki, Esq., Richard Egbert, Esq., Edward Romano, Esq.]

---

* Judge Campbell and Judge Stahl did not participate in the consideration of the en banc petition.

## APPENDIX C

**United States Court of Appeals**
**For the First Circuit**

---

Nos. 02-2158

UNITED STATES OF AMERICA,
Appellee,

v.

VINCENT A. CIANCI, JR.,
Defendant, Appellant.

---

Before
Howard, Circuit Judge,
Campbell and Stahl, Senior Circuit Judges.

**JUDGMENT**
Entered: April 5, 2005

This cause came on to be heard on appeal from the United States district court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: Consistent with the court's opinion of August 10, 2004, the conviction of Vincent A. Cianci, Jr. is affirmed. After consideration of the supplemental briefs filed by the parties, we vacate the sentence of defendant Vincent A. Cianci, Jr., and remand the action to the district court for resentencing pursuant to United States v. Booker, 125 S. Ct. 738 (2005). We

intimate no view as to what sentence should be imposed on remand.

**By the Court:**
Richard Cushing Donovan, Clerk.

/s/ Julie Gregg
By: Julie Gregg, Operations Manager

[Certified copies to Hon. Ernest C. Torres and Mr. David Dimarzio. Copies to Mr. MacFadyen, Mr. Egbert, Mr. Romano, Mr. Rose, Mr. Lockhart, Ms. Curran, Mr. Iannotti, Mr. Donnelly, Mr. Moore, Mr. O'Brien, Mr. Traini, and Mr. Bicki.]

**United States Court of Appeals**
**For the First Circuit**

---

No. 02-2165

UNITED STATES OF AMERICA,
Appellee,

v.

VINCENT A. CIANCI, JR.,
Defendant, Appellant.

---

Before
Howard, Circuit Judge,
Campbell and Stahl, Senior Circuit Judges.

**JUDGMENT**
Entered: April 5, 2005

This cause came on to be heard on appeal from the United States district court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: Consistent with the court's opinion of August 10, 2004, the conviction of Vincent A. Cianci, Jr. is affirmed. After consideration of the supplemental briefs filed by the parties, we vacate the sentence of defendant Vincent A. Cianci, Jr., and remand the action to the district court for resentencing pursuant to United States v. Booker, 125 S. Ct. 738 (2005). We

intimate no view as to what sentence should be imposed on remand.

**By the Court:**
Richard Cushing Donovan, Clerk.

/s/ Julie Gregg
By: Julie Gregg, Operations Manager

[Certified copies to Hon. Ernest C. Torres and Mr. David Dimarzio. Copies to Mr. MacFadyen, Mr. Egbert, Mr. Romano, Mr. Rose, Mr. Lockhart, Ms. Curran, Mr. Iannotti, Mr. Donnelly, Mr. Moore, Mr. O'Brien, Mr. Traini, and Mr. Bicki.]

**United States Court of Appeals**
**For the First Circuit**

---

No. 02-2288

UNITED STATES OF AMERICA,
Appellee,

v.

VINCENT A. CIANCI, JR.,
Defendant, Appellant.

---

Before
Howard, Circuit Judge,
Campbell and Stahl, Senior Circuit Judges.

**JUDGMENT**
Entered: April 5, 2005

This cause came on to be heard on appeal from the United States district court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: Consistent with the court's opinion of August 10, 2004, the conviction of Vincent A. Cianci, Jr. is affirmed. After consideration of the supplemental briefs filed by the parties, we vacate the sentence of defendant Vincent A. Cianci, Jr., and remand the action to the district court for resentencing pursuant to United States v. Booker, 125 S. Ct. 738 (2005). We

intimate no view as to what sentence should be imposed on remand.

**By the Court:**
Richard Cushing Donovan, Clerk.

/s/ Julie Gregg
By: Julie Gregg, Operations Manager

[Certified copies to Hon. Ernest C. Torres and Mr. David Dimarzio. Copies to Mr. MacFadyen, Mr. Egbert, Mr. Romano, Mr. Rose, Mr. Lockhart, Ms. Curran, Mr. Iannotti, Mr. Donnelly, Mr. Moore, Mr. O'Brien, Mr. Traini, and Mr. Bicki.]

FILED
SEP 6 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-43

# In the Supreme Court of the United States

VINCENT A. CIANCI, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*
ALICE S. FISHER
*Assistant Attorney General*
JOEL M. GERSHOWITZ
*Attorney*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether a governmental entity may constitute a member of an association-in-fact "enterprise" under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961(4), if the entity's activities were controlled by individuals who had an unlawful purpose and who manipulated the entity's activities for that purpose.

2. Whether petitioner's tape-recorded statements to a government agent were admissible under the "state of mind" exception to the hearsay rule in Federal Rule of Evidence 803(3).

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 8 |
| Conclusion | 19 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Arthur* v. *United States*, 534 U.S. 1043 (2001) | 13 |
| *Atlas Pile Driving Co.* v. *DiCon Fin. Co.*, 886 F.2d 986 (8th Cir. 1989) | 8 |
| *Blakely* v. *Washington*, 542 U.S. 296 (2004) | 2 |
| *Cedric Kushner Promotions* v. *King*, 533 U.S. 158 (2001) | 11 |
| *Kirillov* v. *United States*, 534 U.S. 1043 (2001) | 13 |
| *Lancaster Cmty. Hosp.* v. *Antelope Valley Hosp. Dist.*, 940 F.2d 397 (9th Cir. 1991), cert. denied, 502 U.S. 1094 (1992) | 9 |
| *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285 (1892) | 15 |
| *Stephens, Inc.* v. *Geldermann, Inc.*, 962 F.2d 808 (8th Cir. 1992) | 12 |
| *United States* v. *Blandford*, 33 F.3d 685 (6th Cir. 1994), cert. denied, 514 U.S. 1095 (1995) | 9 |
| *United States* v. *Blinder*, 10 F.3d 1468 (9th Cir. 1993) | 8 |
| *United States* v. *Booker*, 125 S. Ct. 738 (2005) | 2 |

Cases—Continued: Page

*United States* v. *Console*, 13 F.3d 641 (3d Cir. 1993), cert. denied, 511 U.S. 1076 and 513 U.S. 812 (1994) ..... 8

*United States* v. *DiMaria*, 727 F.2d 265 (2d Cir. 1984) ..... 16

*United States* v. *Dischner*, 974 F.2d 1502 (9th Cir. 1992), cert. denied, 507 U.S. 923 (1993) ..... 10

*United States* v. *Feldman*, 853 F.2d 648 (9th Cir. 1988), cert. denied, 489 U.S. 1030 (1989) ..... 11

*United States* v. *Harvey*, 959 F.2d 1371 (7th Cir. 1992) ..... 16

*United States* v. *Jackson*, 780 F.2d 1305 (7th Cir. 1986) ..... 17

*United States* v. *Laval*, 736 F.2d 5 (2d Cir. 1984) .... 16

*United States* v. *LeMaster*, 54 F.3d 1224 (6th Cir. 1995), cert. denied, 516 U.S. 1043 (1996) ..... 14

*United States* v. *Macey*, 8 F.3d 462 (7th Cir. 1993) ..... 16

*United States* v. *Masters*, 924 F.2d 1362 (7th Cir.), cert. denied, 500 U.S. 919 and 502 U.S. 823 (1991) ..... 9

*United States* v. *McDade*, 28 F.3d 283 (3d Cir. 1994) ..... 10

*United States* v. *Peak*, 856 F.2d 825 (7th Cir.), cert. denied, 488 U.S. 969 (1988) ..... 16

*United States* v. *Perholtz*, 842 F.2d 343 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988) ..... 9, 11, 12

*United States* v. *Ponticelli*, 622 F.2d 985 (9th Cir.), cert. denied, 449 U.S. 1016 (1980) ..... 11

Cases—Continued: Page

*United States* v. *Reyes*, 239 F.3d 722 (5th Cir.), cert. denied, 533 U.S. 961 and 534 U.S. 868 (2001) ..... 14

*United States* v. *Turkette*, 452 U.S. 576 (1981) ..... 5, 9, 10, 11

*VanDenBroeck* v. *CommonPoint Mortgage Co.*, 210 F.3d 696 (6th Cir. 2000) ..... 12

Statutes and rules:

Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. 1961 *et seq.*:

18 U.S.C. 1961(4) ..... 3, 8, 9

18 U.S.C. 1962(c) ..... 3

18 U.S.C. 1962(d) ..... 2, 3

Fed. R. Evid.:

Rule 402 ..... 18

Rule 403 ..... 18

Rule 803 ..... 13, 14, 15

Rule 803(1) ..... 14

Rule 803(3) ..... 4, 13, 14, 15, 16, 17

Miscellaneous:

2 John W. Strong et al., *McCormick on Evidence* (5th ed. 1999) ..... 16

5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* (2d ed. 2000) ..... 14

# In the Supreme Court of the United States

No. 05-43

VINCENT A. CIANCI, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-75) is reported at 378 F.3d 71. The memorandum and order of the district court denying petitioner's motion for a judgment of acquittal is reported at 210 F. Supp. 2d 71.

### JURISDICTION

The opinion of the court of appeals was issued on August 10, 2004. A petition for rehearing was denied on October 8, 2004 (Pet. App. 76-77). The judgment of the court of appeals (*id.* at 78-83) was entered on April 5, 2005. The petition for a writ of certiorari was filed on July 1, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of Rhode Island, petitioner was convicted of one count of racketeering conspiracy, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d). He was sentenced to 64 months of imprisonment, to be followed by two years of supervised release, and was ordered to forfeit $250,000 in a campaign fund. The court of appeals affirmed petitioner's conviction. Pet. App. 1-75.[1]

1. Petitioner served as mayor of Providence, Rhode Island, from 1974 to 1984 and from 1991 to 2002. Co-defendant Frank E. Corrente served as Providence's director of administration (and was effectively petitioner's second in command); co-defendant Richard E. Autiello served as a member of the City Towing Association. From 1991 to 1999, petitioner and his co-defendants engaged in a scheme to use petitioner's political position to sell municipal favors. Specifically, the government presented evidence at trial that petitioner and his co-defendants awarded (or caused to be awarded) municipal jobs, city contracts, tax abatements, and building-code variances in return for cash (including contributions to petitioner's campaign fund) and other

---

[1] The court of appeals initially issued an opinion affirming petitioner's conviction (and those of his co-defendants), but requesting supplemental briefing and argument on, *inter alia*, whether petitioner's sentence should be vacated in light of *Blakely* v. *Washington*, 542 U.S. 296 (2004). Pet. App. 64. While supplemental briefing was ongoing, petitioner unsuccessfully sought en banc review. *Id.* at 76-77. The court of appeals subsequently entered a single order of judgment, affirming petitioner's conviction but vacating his sentence in light of *United States* v. *Booker*, 125 S. Ct. 738 (2005). Pet. App. 78-79. Petitioner received the same sentence on remand.

items of value. Petitioner or Corrente would typically call or meet with city officials to ensure that the desired actions were taken; Corrente was responsible for soliciting and collecting payments. Pet. App. 1, 7, 19, 25; Gov't C.A. Br. 4-48.

2. Petitioner and his co-defendants were charged with various racketeering, bribery, and extortion offenses. As relevant here, all three defendants were charged with one count of racketeering conspiracy, in violation of 18 U.S.C. 1962(d). That section of RICO makes it unlawful to conspire to violate any of RICO's substantive provisions, including 18 U.S.C. 1962(c), which in turn makes it unlawful "for any person employed by or associated with any enterprise engaged in [interstate commerce] to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." RICO defines an "enterprise" to "include[] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). In this case, the superseding indictment alleged that the relevant "enterprise" consisted of the following persons associated in fact: petitioner; Corrente; Autiello; the City of Providence (including, but not limited to, various specified offices and agencies); Friends of Cianci, petitioner's political organization; and others known and unknown to the grand jury. Pet. App. 6.[2]

One of the evidentiary issues at trial involved the admissibility of tape-recorded statements by petitioner to an undercover government agent. In the recorded

---

[2] The original indictment alleged a somewhat broader enterprise. See Pet. 5 n.1.

conversation, the agent posed as an air-conditioning salesman who was seeking a city contract. Petitioner referred him to a local official. Although the subject of corruption had not been broached, petitioner told the agent that the official was "honest as the day is long." Petitioner then stated: "No one will ask you for a thing. If anybody does, you pick up the phone [and] call me. I'll cut his * * * * off and [have him] arrested." Later in the conversation, petitioner, in introducing the agent to a third party, said that the agent was "probably" working for the Federal Bureau of Investigation. C.A. App. 378, 382.

At trial, petitioner sought admission of his tape-recorded statements under the "state of mind" exception to the hearsay rule in Federal Rule of Evidence 803(3), which (with an exception not relevant here) allows the admission of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." The district court declined to admit petitioner's statements, on the ground that they were not relevant. The court reasoned that "the conversation * * * does not relate to any predicate act or to any specific matter with respect to which the Government has presented any evidence." Instead, the court noted that "the import of the statement is to show what [petitioner] did or didn't do on other occasions with respect to unrelated matters." Pet. App. 60; 6/6 02 Tr. 106-110.

Petitioner was convicted on the racketeering-conspiracy count, but was acquitted on the other counts against him. Corrente and Autiello were convicted both on the racketeering-conspiracy count and on various other counts. Pet. App. 2. The district court denied the

defendants' motion for a judgment of acquittal on the racketeering-conspiracy count. 210 F. Supp. 2d 71.

3. The court of appeals affirmed the convictions. Pet. App. 1-75.

a. As relevant here, the court of appeals rejected the defendants' contention that the City of Providence could not constitute a member of a RICO association-in-fact "enterprise" (or, in the alternative, that the government had failed to prove that the City of Providence was in fact a member of the alleged enterprise). Pet. App. 10-24. At the outset, the court explained that the mere fact that persons jointly engaged in conduct that amounted to a "pattern of racketeering activity" does not compel the conclusion that the persons constituted a RICO association-in-fact "enterprise." *Id.* at 11. The court recognized that other courts had held that an association-in-fact enterprise must have an "ascertainable structure" distinct from that inherent in the conduct of the underlying racketeering activity. *Id.* at 11-12. The court of appeals noted, however, that it had previously refused to adopt an "ascertainable structure" requirement, but had instead held, consistent with this Court's decision in *United States* v. *Turkette*, 452 U.S. 576 (1981), that the members of an association-in-fact enterprise must "function as an ongoing unit" and "constitute an ongoing organization," and that it was "important" that the members "share a common purpose." Pet. App. 12 (citations omitted).

The court of appeals proceeded to reject the defendants' argument that a governmental entity could not constitute a member of an association-in-fact enterprise because such an entity could not act with an unlawful intent. Pet. App. 12-13. The court noted that "it is uncontroversial that corporate entities, including munici-

pal and county ones, can be included within association-in-fact RICO enterprises," and that a legitimate entity could constitute a member of a RICO enterprise. *Id.* at 13. The court reasoned that, while it was "obvious" that a corporate (or governmental) entity "does not have a mind of its own for purposes of RICO," *id.* at 15, it could have an imputed unlawful purpose if "those who control the entit[y] share the purposes of the enterprise," *id.* at 13. The court further reasoned that "[a] RICO enterprise animated by an illicit common purpose can be comprised of an association-in-fact of municipal entities and human members when the latter exploits the former to carry out that purpose." *Id.* at 13-14.

The court of appeals then considered at length, and ultimately rejected, the defendants' contention that "the evidence introduced at trial in support of the alleged schemes set forth above * * * was insufficient to ground a finding that the schemes were conducted through the specific entity alleged in the indictment to have constituted a RICO enterprise." Pet. App. 15-24. The court noted that the jury was correctly instructed on the requirements for a RICO enterprise, *id.* at 16-17, and agreed with the government that "the jury's enterprise finding is sustainable because there was sufficient evidence that [petitioner] and Corrente exercised substantial control over the municipal entities named as members of the enterprise," *id.* at 17. While emphasizing that "[b]eing named in the enterprise does not make the City itself criminally or civilly liable under RICO," the court noted that "[i]t bears repeating that the RICO statute defines 'enterprise' broadly." *Id.* at 23.

b. The court of appeals also rejected petitioner's contention that his tape-recorded statements were admissible under the "state of mind" exception to the hear-

say rule. Pet. App. 59-63. The court reasoned that "[petitioner's] statement was not admissible in order to show what [petitioner] might have done or not done on other occasions not proximate to the time the statement was uttered." *Id.* at 61. Instead, "[t]he only purpose for which the statement could have been admitted would have been to establish [petitioner's] state of mind at the time the statement was made." *Ibid.* "That the statement was made at one point during the time of the charged conspiracy cannot be sufficient to mandate its admission," the court continued, "especially where the latter part of the statement—'He's probably an FBI agent'—places doubt on what [petitioner] claims is the probative value and relevance of the statement as a whole." *Id.* at 61-62. The court reasoned that "[w]hether [petitioner's] statement is 'forward-looking' or refers to past acts and events is unclear from the statement itself," and ultimately determined that "it was within the district court's discretion to conclude that the statement, at least in part, applied to past acts of [petitioner's] administration and were to a large extent 'self-serving' attempts to cover tracks already made." *Id.* at 62.[3]

c. Judge Howard concurred in part and dissented in part. Pet. App. 64-75. He noted that he was "not persuaded" that the majority had "convincingly fended off" the defendants' argument that a municipal entity cannot be regarded as a member of an association-in-fact enterprise for RICO purposes. *Id.* at 64-65. Assuming, however, that it could—and that the correct test for determining membership was whether individuals with an

[3] The court of appeals also rejected petitioner's contention, made for the first time on appeal, that the failure to admit the tape recording violated due process. Pet. App. 62-63.

unlawful purpose exercised control over the municipal entity at issue—Judge Howard determined that the government had failed to prove that petitioner and Corrente sufficiently controlled the activities of the named municipal entities that their unlawful purpose could be imputed to those entities. *Id.* at 68-75. He reasoned that evidence that a municipal entity merely "acceded to a mobster's request (but without knowledge of the purposes underlining the request)" was insufficient to meet that requirement. *Id.* at 71. Because Judge Howard would have reversed petitioner's RICO conviction on that ground, he did not reach the issue whether petitioner's tape-recorded statements were admissible. *Id.* at 75.

## ARGUMENT

1. Petitioner's contention (Pet. 11-20) that the City of Providence could not constitute a member of a RICO association-in-fact "enterprise" does not warrant further review.

a. RICO defines an "enterprise" to "include[] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals *associated in fact* although not a legal entity." 18 U.S.C. 1961(4) (emphasis added). Although the statute lists only "any union or group of *individuals*" as an example of an association-in-fact enterprise, the courts of appeals have consistently held that the membership of an association-in-fact enterprise is not limited to individuals, but may extend to other legal entities. See, *e.g.*, *United States* v. *Console*, 13 F.3d 641, 652 (3d Cir. 1993), cert. denied, 511 U.S. 1076 and 513 U.S. 812 (1994); *United States* v. *Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993); *Atlas Pile Driving Co.* v. *DiCon Fin. Co.*, 886

F.2d 986, 995 n.7 (8th Cir. 1989). In so holding, those courts have reasoned that Congress intended the list of "enterprises" in 18 U.S.C. 1961(4) to be illustrative, rather than exhaustive, as reflected by the statute's use of the term "includes." See, *e.g.*, *United States* v. *Masters*, 924 F.2d 1362, 1366 (7th Cir.), cert. denied, 500 U.S. 919 and 502 U.S. 823 (1991); *United States* v. *Perlholtz*, 842 F.2d 343, 353 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988); cf. *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) (noting that "[t]here is no restriction upon the associations embraced by the definition").

There is no basis for excluding governmental bodies from the legal entities that may be members of an association-in-fact conspiracy under RICO. Cf. Pet. 3 (contending that, because this case involves a governmental entity, "[t]he RICO issue [*i.e.*, whether entities that do not share the illicit purpose of an association-in-fact enterprise may be members of it] is presented here in high relief"). At least one court of appeals has held that governmental entities may not be subject to liability under RICO, on the ground that such entities are themselves "incapable of forming a malicious intent." *Lancaster Cmty. Hosp.* v. *Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991), cert. denied, 502 U.S. 1094 (1992). Even if a governmental entity is immune from liability under RICO, however, the entity can still serve as a member of a RICO enterprise, with the result that persons who participate in the conduct of the enterprise's affairs through a pattern of racketeering activity may themselves be subject to liability. Accordingly, as with other types of legal entities, courts of appeals have uniformly recognized that governmental entities may qualify as members of an association-in-fact enterprise. See, *e.g.*, *United States* v. *Blandford*, 33 F.3d 685, 703

(6th Cir. 1994) (state legislative office), cert. denied, 514 U.S. 1095 (1995); *United States* v. *McDade*, 28 F.3d 283, 296-297 (3d Cir. 1994) (congressional offices); *United States* v. *Dischner*, 974 F.2d 1502, 1511 (9th Cir. 1992) (mayor's office and department of public works), cert. denied, 507 U.S. 923 (1993).

b. Although petitioner apparently does not contend that a governmental entity could never be a member of an association-in-fact enterprise, he does assert (Pet. 14-17) that the courts of appeals have established different standards for when legal entities (including governmental entities) can be members of an association-in-fact enterprise.[1] That assertion lacks merit.

In *Turkette*, this Court defined an association-in-fact enterprise as "a group of persons associated together for a common purpose of engaging in a course of conduct." 452 U.S. at 583. In this case, the court of appeals held that, although a legal entity (such as a governmental entity) could not itself have an unlawful purpose, such a purpose could be imputed to it if the entity's activities were controlled by individuals who themselves had such a purpose and who manipulated the entity's activities for that purpose. Pet. App. 13, 15. When individuals capture control of a governmental entity and conscript it to serve their own ends, it is proper to consider those ends (even if corrupt) in determining whether the entity is pursuing a "common purpose" with

---

[1] Petitioner does not also contend that the court of appeals erred by determining that the activities of the governmental entities at issue were controlled by petitioner and his co-defendant Corrente—the issue on which the majority and dissent below disagreed at length. Compare Pet. App. 15-24 (majority), with *id.* at 68-75 (dissent). In any event, that determination was quintessentially fact-bound and does not warrant further review.

the other members of the alleged association-in-fact enterprise. There is no reason to treat the governmental entity's lawful objectives as its only ones, when reality is otherwise. At the same time, the structure of the governmental entity itself helps to ensure that the "enterprise" is "an entity separate and apart from the pattern of activity in which it engages," *Turkette*, 452 U.S. at 583, as well as distinct from the persons liable under RICO, see *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 162-163 (2001).

In asserting (Pet. 14) that the courts of appeals have taken "varying approaches" to the question of when legal entities qualify as members of an association-in-fact enterprise, petitioner cites two decisions of other courts of appeals on which the court below itself relied. Those decisions do not conflict with the decision below. In *United States* v. *Feldman*, 853 F.2d 648 (1988), cert. denied, 489 U.S. 1030 (1989), the Ninth Circuit held that "RICO does not require 'intentional' or 'purposeful' behavior by corporations charged as members of an association-in-fact [enterprise]." *Id.* at 657. The Ninth Circuit proceeded to determine, consistent with *Turkette*, that there was sufficient evidence that there was an ongoing organization and that the members of the organization functioned as a continuing unit. *Id.* at 657-659. At most, *Feldman* suggests that a legal entity may be a member of an association-in-fact enterprise even *absent* a showing that the entity's activities were controlled by individuals who had an unlawful purpose—not that such a showing would be insufficient. And in *Perlholtz*, *supra*, the D.C. Circuit reasoned that the corporations at issue qualified as members of a unitary association-in-fact enterprise because they were "controlled as a practical matter" by individuals who

"sought financial gain from the award of government contracts" and "were instrumental in executing the charged schemes." 842 F.2d at 354. Like the decision below, *Perlholtz* stands simply for the proposition that a legal entity can be regarded as a member of an association-in-fact enterprise if the entity's activities were controlled by individuals who had an unlawful purpose and who manipulated the entity's activities for that purpose.[5]

The other two cases cited by petitioner are likewise unhelpful to him. In *VanDenBroeck* v. *CommonPoint Mortgage Co.*, 210 F.3d 696 (6th Cir. 2000), the court concluded that an alleged association-in-fact enterprise involving a mortgage lender and secondary lenders was invalid because the relationship between the lenders lacked even a "minimal level of organizational structure" and was "too unstable and fluid" to qualify as a "continuing unit" under *Turkette*. *Id.* at 699-700. Similarly, in *Stephens, Inc.* v. *Geldermann, Inc.*, 962 F.2d 808 (8th Cir. 1992), the court concluded that the alleged enterprise was invalid because "[the] group * * * had no structure independent of the alleged racketeering activity" and "[t]he only common factor that linked all [the] parties together and defined them as a distinct group was their direct or indirect participation in [the] scheme to defraud." *Id.* at 815-816. Neither *VanDenBroeck* nor *Stephens* rejects the proposition that a legal entity can qualify as a member of an association-in-fact enterprise

---

[5] As petitioner notes (Pet. 16), the D.C. Circuit also determined that the individuals "formed their corporations to further their common objectives." *Perlholtz*, 842 F.2d at 354. The court, however, relied on that fact not in concluding that the corporations qualified as members of a unitary association-in-fact enterprise, but rather in concluding that an individual defendant was *distinct* from the enterprise. See *ibid.*

upon a showing that the activities of the entity were controlled by individuals with an unlawful purpose; instead, each of those cases holds only that the organization at issue lacked sufficient structure to constitute an association-in-fact enterprise. Petitioner therefore fails to identify a circuit conflict that warrants this Court's review.[6]

2. Further review is also unwarranted on petitioner's claim (Pet. 21-29) that his tape-recorded statements to the undercover government agent were admissible under the "state of mind" exception to the hearsay rule.

a. As relevant here, Federal Rule of Evidence 803(3) provides that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" is admissible even if that statement constitutes hearsay.[7] Rule 803's various exceptions to the hearsay rule are predicated on the notion that, under the circumstances specified in the exceptions, a hearsay statement is inherently reliable. See

---

[6] As the court below acknowledged (Pet. App. 11-12), some courts of appeals have held that an association-in-fact enterprise must have an "ascertainable structure" distinct from that inherent in the conduct of the underlying racketeering activity, while others have disclaimed such a requirement. Although petitioner recognizes the existence of cases adopting the "ascertainable structure" requirement, see, *e.g.*, Pet. 18 n.7, he does not explicitly ask this Court to resolve any broader conflict concerning that requirement. This Court has denied review in at least two cases in which other petitioners have asserted such a conflict. See *Kirillov* v. *United States*, 534 U.S. 1043 (2001) (No. 01-5965); *Arthur* v. *United States*, 534 U.S. 1043 (2001) (No. 01-5868).

[7] Petitioner does not dispute that his statements to the government agent constituted hearsay because they were being offered to prove the truth of the matter asserted.

Fed. R. Evid. 803 advisory committee's note. A statement covered by the "state of mind" exception in Rule 803(3), which constitutes a "specialized application" of the "present sense impression" exception in Rule 803(1), is considered to be inherently reliable on the theory that "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." *Ibid.* Consistent with that theory, courts have held that, where the declarant has "had an opportunity to reflect and possibly fabricate or misrepresent his thoughts," a statement does not qualify for the "state of mind" exception. *United States* v. *LeMaster*, 54 F.3d 1224, 1231 (6th Cir. 1995), cert. denied, 516 U.S. 1043 (1996); accord *United States* v. *Reyes*, 239 F.3d 722, 743 (5th Cir.), cert. denied, 533 U.S. 961 and 534 U.S. 868 (2001); *United States* v. *Ponticelli*, 622 F.2d 985, 991 (9th Cir.), cert. denied, 449 U.S. 1016 (1980); see generally 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 803.05[2][a] at 803-29 & n.4 (2d ed. 2000) (citing other cases).

Because petitioner had the "opportunity to reflect and possibly fabricate or misrepresent his thoughts," his tape-recorded statements do not qualify for the "state of mind" exception. As the transcript of the conversation reflects (C.A. App. 347-392), petitioner made the statements at issue during a lengthy meeting over lunch with the government agent, who was posing as an air-conditioning salesman seeking a city contract. At some point either before or during the meeting, petitioner formed the suspicion that the agent was working for the Federal Bureau of Investigation—and subsequently expressed that suspicion to a third party. See *id.* at 382. Moreover, petitioner made the statements at issue—in which he told the government agent, *inter alia*, that "[n]o one

w[ould] ask [him] for a thing," *id.* at 378—even though the subject of corruption had not even been broached. All of those circumstances suggest that petitioner had ample opportunity (and motive) to fabricate his statements, and the court of appeals thus correctly concluded that petitioner's statements do not qualify for the "state of mind" exception.

b. Petitioner contends (Pet. 21, 22) that the court of appeals' decision is inconsistent with this Court's decision in *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285 (1892). That contention lacks merit. In *Mutual Life*, this Court merely stated the common-law rule, later codified in Rule 803(3), that a hearsay statement of the declarant's state of mind was admissible where that statement was relevant to the underlying issue in the litigation. *Id.* at 295-296. Although the Court noted that the truth or falsity of such a statement was a matter for the jury, *id.* at 296, the Court did not specifically address whether, and under what circumstances, a statement may be so far removed from a "natural reflex[]" that it would not qualify for the common-law "state of mind" exception, *ibid.* Notably, in asserting that Rule 803(3) left the rule of *Mutual Life* "undisturbed," the Judicial Conference Advisory Committee expressly read *Mutual Life* as doing nothing more than "allowing evidence of intention as tending to prove the doing of the act intended." See Fed. R. Evid. 803 advisory committee's note. *Mutual Life* therefore sheds little light on the circumstances under which a declaration does not qualify for the "state of mind" exception under Rule 803(3).

c. Petitioner correctly notes (Pet. 20-21, 23-26) that the Second Circuit has held that statements are admissible under the "state of mind" exception regardless of

their lack of trustworthiness, reasoning that the credibility of such statements is a matter for the factfinder to resolve. See, *e.g.*, *United States* v. *Laural*, 736 F.2d 5, 8-9 (1984); *United States* v. *DiMaria*, 727 F.2d 265, 271-272 (1984). Petitioner all but acknowledges, however, that the Second Circuit's decisions in *Laural* and *DiMaria* can be reconciled with the decisions of other circuits excluding statements where the declarant had an opportunity to fabricate them. See Pet. 25 (noting that "[a]n inquiry into whether the declarant had time to reflect is similar to, but not the same as, an inquiry into the declarant's credibility"); cf. 2 John W. Strong et al., *McCormick on Evidence* § 274, at 217 n.8 (5th ed. 1999) (suggesting that "these positions share some common ground"). And, contrary to petitioner's assertions (Pet. 21, 23-24), the Seventh Circuit has attempted to reconcile the standards of the Second Circuit and other circuits. In *United States* v. *Peak*, 856 F.2d 825, cert. denied, 488 U.S. 969 (1988), the Seventh Circuit held that a court could not exclude a statement under Rule 803(3) on the ground that the declarant was not credible, but it also recognized that a court *could* exclude a statement on the ground that the degree of reliability inherent in the statement was low. *Id.* at 834. And in other cases, the Seventh Circuit has expressly held that, in deciding whether to exclude a statement under Rule 803(3), a court could consider whether the declarant had the opportunity to fabricate the statement. See, *e.g.*, *United States* v. *Macey*, 8 F.3d 462, 467-468 (7th Cir. 1993); *United States* v. *Harvey*, 959 F.2d 1371, 1375 (7th Cir.

1992); *United States* v. *Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986).[8]

Even assuming, however, that some tension exists in the various circuits' approaches, this case would be a poor vehicle for resolving it. The district court excluded petitioner's statements not on the ground that they were unreliable, but rather on the ground that they were irrelevant to the underlying legal issues because they "did not relate to any predicate act or to any specific matter with respect to which the Government has presented any evidence." Pet. App. 60; 6/6/02 Tr. 107. And while the court of appeals noted that petitioner's statements were "self-serving," it also expressed doubt about the relevance of the statements, noting that "[t]he only purpose for which the statement could have been admitted would have been to establish [petitioner's] state of mind at the time the statement was made" and adding that "[the fact] [t]hat the statement was made at one point during the time of charged conspiracy cannot be sufficient to mandate its admission." Pet. App. 61.[9] To the extent that petitioner's statements were not relevant, they would not be admissible even if they otherwise met

---

[8] Petitioner also suggests (Pet. 24) that the Fifth, Sixth, and Ninth Circuits have adopted a standard that "fall[s] somewhere between the ruling of the First Circuit in this case and the contrary holdings of the Seventh and Second Circuits." But the court of appeals in this case *relied* on decisions of the Fifth and Ninth Circuits, see Pet. App. 62, and petitioner identifies nothing in the decision below that squarely conflicts with any Fifth, Sixth, or Ninth Circuit decision.

[9] Petitioner seemingly suggests (Pet. 20) that his statements were relevant because they constituted "statement[s] of future intention." Even assuming, however, that petitioner's statements were forward-looking (as the text of Rule 803(3) itself requires), it is clear that they related only to the particular transaction being discussed. See Pet. App. 60.

the requirements of Rule 803(3). Cf. *Jackson*, 780 F.2d at 1315 (excluding, primarily on relevance grounds, statements about declarants' intent made two years after the actions at issue).[10]

Finally, even assuming that petitioner's statements had some marginal relevance, any error in failing to admit those statements was harmless. Although the court of appeals did not reach the government's argument that any error was harmless, it did recognize, in rejecting petitioner's related due process claim, "the amount of evidence of [petitioner's] criminal knowledge and intent presented at trial." Pet. App. 63. In light of that overwhelming evidence, the exclusion of statements expressing petitioner's intent in the context of events not at issue cannot affect petitioner's substantial rights. Further review of petitioner's evidentiary claim is therefore not merited.

---

[10] Petitioner correctly notes (Pet. 29 n.10) that the courts below did not rely on Federal Rule of Evidence 403, which allows the exclusion of *relevant* evidence where the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or other considerations. To the extent that the courts below concluded that the evidence at issue had *no* relevance, however, the pertinent rule is not Rule 403, but rather Rule 402, which provides that evidence that is not relevant is not admissible.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*
ALICE S. FISHER
*Assistant Attorney General*
JOEL M. GERSHOWITZ
*Attorney*

SEPTEMBER 2005